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THE ROMANCE OF THE LAW MERCHANT

W. A. BEWES

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THE ROMANCE OF THE LAW MERCHANT

BEING

AN INTRODUCTION TO THE STUDY OF INTERNATIONAL AND COMMERCIAL LAW

WITH SOME ACCOUNT OF

THE COMMERCE AND FAIRS OF THE MIDDLE AGES

BY

WYNDHAM ANSTIS BEWES, LL.B. (LONDON),

Author of "The Law of Waste," "The Law and Practice of the Stock Exchange," etc.

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WITH

A FOREWORD

BY

THE RIGHT HONOURABLE SIR RICHARD ATKIN,

One of the Judges of the Court of Appeal, England.

"Consuetudo . . . . vicem legis obtinet, longaevi enim temporis usus et consuetudinis non est vilis auctoritas."—*Bracton, i, 3, 2.*

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FOREWORD

BY

THE RIGHT HONOURABLE SIR RICHARD ATKIN,
One of the Lord Justices of the Court of Appeal, London, England.

THEY whose lawful occasions bring them into the commercial courts of this country are not usually associated with romance; whereby they are doubtless spared much publicity. But the practitioners in such courts are accustomed to tales of adventure and hairbreadth escapes that might provide the material for bales of stories should any visitor from the world of literature ever stray thereto. There are tales told in the Admiralty Court almost daily of perils by sea, endurance, sacrifice, courage, resource of mariners, that may some day attract the reporters that flock to an adjoining court: and secure for them and their employers a refreshing reward. This book reveals to anyone who can sympathise with the romance of commerce to-day the same spirit pervading commerce and the formation and enforcement of the rules of commerce from the earliest ages.

It is, perhaps, fortunate that the law-makers of former days took little interest in the rules of commerce, provided that the results were such as to ensure that the sovereign lord had sufficient whereof to take toll. As a result, traders made their own rules and administered them summarily at their own courts, with the tacit or express approval of the Sovereign. Such rules have in the course of ages crystallised into law: in many cases

recorded in statutory codes. The history of this growth takes us over the trade routes of Asia, transports us in the ships of Hiram with cargoes of gold and ivory, apes and peacocks, carries us in voyages along the Mediterranean and beyond trading for the Carthaginians, finds us making voyages in the Euxine in joint adventure with Greeks, when our disputes will be determined by retaining the leaders of the Commercial Court at Athens, of whom Demosthenes is most in request: and will take us to all the fairs and markets of Europe: and expose us to the special customs of our old English towns.

I know of no English book that has taken such an extensive survey. The author is well qualified by his knowledge of the existing laws and customs of this and many other countries to guide the reader over so wide a field. His work will, I trust, not only create an interest in the past, but give a vision of the romance that attends the commerce of the present.

J. R. Atkin.

PREFACE.

Although this book is but a small one, it deals with an important and rather obscure subject—so obscure that I cannot boast of having solved the origins of all the branches of the Law Merchant. It is, in fact, but a contribution to the solution, which may, perhaps, be of some assistance to a future investigator who may bring greater aptitude to the study.

One cannot get very far if one confines one's attention to the law as received and administered in England, since the countries where it received its first and most considerable extension were Italy and France; and it therefore seemed good to me to consult chiefly French writers as the best sources of information. For the conditions of international trade in the Middle Ages, they also appeared to afford the most complete and detailed descriptions. I have therefore made much reference to them; nor have I neglected Spanish writers who have dealt with the trade of the Peninsula, through whom may be acquired some knowledge of the early market law of that country.

I have deliberately curtailed the part of the book which treats of the fair and consular courts, since this would have made the book too long, while it would have been a work of supererogation to add to the number of authors, like Mr. W. S. Holdsworth, whose account in "The History of British Commerce" is both excellent

and sufficient. It also seemed best for similar reasons not to deal extensively with certain subjects; such as maritime law (except in the matter of insurance), since experts have already and sufficiently explored such branches.

I have endeavoured to show, perhaps for the first time in this country, that for some at least of our mercantile law we are indebted to the East—how much we shall perhaps never know. It has been my endeavour to avoid the snare of the argument commonly called *post hoc ergo propter hoc*, and I trust I have succeeded. The evidence of Eastern influence, except in two notable instances, is cumulative rather than direct: but perhaps is none the less weighty on that account.

Lawyers will think that I might well have omitted the parts dealing with the great international fairs, but I have had in mind not only lawyers, but the general reader interested in history, and also the fact that it is a rare thing that we can link up law and the concrete facts of trade quite so clearly as in this instance. The merchants carried their law, as it were, in the same consignment as their goods, and both law and goods remained in the places where they traded and became part of the general stock of the country. With small variations, the law in all countries was homogeneous, being, perhaps, least adopted in our own land. It was a fortunate circumstance that it arose before the renewed study of the Roman law became general and that law itself authoritative, or the law merchant might have proved rather less adapted to commercial requirements. The influence of the Roman law is not generally thought to have been beneficial, but, on the whole, the present laws of commerce are still the laws of the merchants,

growing, as they first grew, out of the necessities and customs of trade.

As Jean Toubeau, to whose "Institutes du droit Consulaire" (2nd ed. 1700) I make frequent reference, will not be well known to most readers, it is necessary to say that he was Juge-Consul des Marchands at Bourges, and that his book appears to constitute a reliable deduction from his own experience and from the consideration of the recognised authorities cited by him.

I have to thank the responsible officials in the British Museum Libraries for much kind assistance.

I desire to acknowledge with sincere appreciation the honour conferred on me by Sir Richard Atkin, who has gone so far as to write the Foreword to this little book.

Wyndham A. Bewes.

September, 1923.
2 King's Bench Walk,
The Temple, E.C.4.

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PART I.

THE LAW MERCHANT AND ITS HISTORY.

CHAPTER I.

The Early Course of the Law Merchant.

In Syria whilom dwelt a company
Of chapmen rich, and thereto sad and true
That widëwherë sent their spicery,
Clothës of gold, and satins rich of hue.
Their chaffare was so thrifty and so new,
That every wight had dainty to chaffare
With them, and eke to sellë them their ware.
The Man of Lawe's Tale.—CHAUCER.

It has been too confidently assumed by most writers that the law merchants arose in Italy in the central part of the Middle Ages, was chiefly founded on Roman law, and was carried by the traders of that country, who at that time almost monopolised international trade, into every country which they penetrated. That the law merchant was indeed the law of the merchants (*a*) is true enough, and so is the assertion that it was applied to all transactions of a mercantile character between merchants, particularly at the great international fairs, which at this time increased greatly in numbers and assumed international importance. But the assumption that the law originated with the Italian merchants is more than disputable. International trade is

(*a*) In *Vanheath* v. *Turner* (1622), Winch 24, Chief Justice Hobart said :—"The custom of merchants is part of the common law of this kingdom, of which the judges ought to take notice : and if any doubt arise to them about their custom, they may send for the merchants to know their custom."

in some measure a constant thing. Although a great revival took place after the new contact with the East which was made by the Crusades, commerce at that time simply changed hands, leaving the Arabs, who had dominated the Mediterranean for about two hundred years, and being undertaken by the Italians and to some extent by the French, and later by British and Norwegian merchants. It is not, therefore, surprising that a great number of shipping terms as well as those of the Eastern goods can be traced into Arabic, while some, at least, of the law merchant—for instance, the use of bills of exchange and the recognition of the *société en commandite*—became common in Europe at this time. As will be seen later on, the former at least were not invented by the Arabs, who indeed invented little. But before the Arabs came the Romans, and before the Romans the Greeks, and before the Greeks the Phœnicians (*b*). And who knows how much of mercantile law and practice was due to these famous navigators and traders, who for so many hundreds of years almost monopolised the sea commerce of the then known world? But even these probably did not originate all which may at first sight appear to be their work. The main facts of this trading are well known, and are set forth in many books, among which we may refer to the volume on their country in the "Story of the Nations" series by G. Rawlinson, the early part of the volume on Assyria by Miss Ragozin in the chapter on "The Sons of Canaan," and "L'Histoire Ancienne de l'Orient" by François Lenormant. We are told of the extraordinary development of the Phœnician trade along the coasts of the islands and mainland of the Mediterranean in search of the little shell fish, each of which yielded one drop

(*b*) As to very early Phœnician settlements in Greece, see "La Légende de Cadmus," by F. Lenormant, "Annales de Philosophie Chrétienne," series v., vol. xv. On the other hand, from the eighth century the Greeks had encroached on and nearly monopolised the trade of their own coasts, of the Euxine and of the coasts of Asia Minor. See "La Grande Grèce," by F. Lenormant, vol. i., p. 269.

of the precious Tyrian dye, colonies being set in all profitable places; then of the search for copper for the making of the valued bronze alloy, the other element in which is tin, in the quest for which they, under the lead of Sidon, explored every accessible corner, but found no adequate supply until they reached the coasts of Cornwall and Devon in their own vessels. Before this, which was after the founding of Cadiz, about B.C. 1100, the tin from the West of England had met them at the mouths of the Rhone, having first been floated up the Loire or the Seine and then carried across to the Rhone Valley. The third most desired commodity was amber, found chiefly on the shores of the Baltic, to reach which the Phœnicians established a caravan route across Germany from the Adriatic, trading on the way.

We must clearly bear in mind the great fact that the broad belt of land lying between Arabia and the Black Sea was but the land stage in the great and almost constant trade from East to West and West to East which followed for untold centuries the narrow trade routes between China on the farthest East and the countries of ultimate distribution, fed from the basin of the Mediterranean. So considerable was this trade in Roman times that Pliny tells us that as much as 100 million sesterces or 200 million francs was sent into the Eastern countries every year in payment of the balance of trade, and it is thought that this was one of the causes which led in time to the impoverishment of the Roman Empire (*c*).

But, in fact, this favoured situation between the Eastern and Western worlds, as then known, was the true source of the wonderful wealth of the Syrian and Assyrian and Babylonian kingdoms, and the desire to obtain and enjoy this mine of riches by taxing the trade routes was one almost certain cause of the wars which led to the downfall of one Power after another; for these countries were toll takers

(*c*) "Relations Politiques et Commerciales, etc.," by J. T. Reinaud, p. 211.

rather than producers, though they did produce woollen fabrics, rugs and carpets, an industry still of great importance in the same region. In much later times we read many accounts of trading voyages from and to the Persian Gulf, more trustworthy than those of Sindibad the Sailor, and these were nearly rivalled in importance by the caravan trade to China and India. Much of the envied wealth of Egypt was due to the Red Sea trade, both to the Far East and along the coast of Africa.

It is difficult for us to form an adequate conception of the magnitude of the caravan commerce conducted by the Arabs to all the great cities of Mesopotamia, Persia, Arabia, Egypt, and even further afield, and of the shipping trade from the Persian Gulf and the Red Sea to India, and ultimately to China and the East Indies; a trade carried on by the Arabs at least as early as the celebrated expedition of Hatasu and one which, through the Elamite branch, was from time to time shared by the merchants of Tyre, when their trade route was free from Egyptian dominance and their trading stations in Arabia were able to function (*d*). We read of the travelling merchants from the times of Jacob and Isaac, of the Kings of Arabia, and of the wealthy Queen of Sheba in the days of Solomon, and of the trade with Dedan, Aden and Saba when Tyre was at its greatest and nearing its doom. With increasing experience the ship of the desert yielded something to the ship of the seas, and the Arabs became a mighty terror on all coasts of the Mediterranean and ravaged Greece, the South of Italy and Sicily (*e*).

The immensity of their caravan trade in the times of the Crusades is sufficiently attested by the fact that in 1191, during the Third Crusade, Richard Cœur de Lion captured one of Saladin's caravans, rashly travelling west of the

(*d*) "L'Histoire Ancienne de l'Orient," by F. Lenormant, vol. vi., p. 364.

(*e*) As to the Arab trade routes, see "Histoire du Commerce, etc.," by Depping, vol. i., p. 8.

Jordan, and became possessed of " very rich spoil of spices, gold, silver, silks, robes, arms of every kind, together with 4,700 camels, besides asses and mules without number." (*f*).

Now the Saracens were masters and the terrors of the Mediterranean for two hundred years—or three hundred, if we date our count from the invasion of France, which was repulsed in 732 by Charles Martel in the decisive Battle of Tours; for by 849 they had possessed themselves, not only of the coast of North Africa, but of Sicily and South Italy, where they remained until expelled by the Normans about the year 1050. All this time the trade, while not altogether in their hands—for we know that Charlemagne had a commercial treaty with Haroun al-Raschid—was at any rate at their mercy; and although they directly traded only with believers, indirectly the Eastern goods reached the lands of the infidels. During the time of the Arab domination in Egypt, as we gather from the Aphrodito papyri volume in the British Museum, the Saracens had three raiding fleets, which started every winter to molest the Christian coasts, one leaving Egypt, one Anatolia, and one Africa; and there were other two fleets—not that the Arab had any great love of the sea: the crews were composed of Greek and Coptic converts and impressed Christians, while the soldiers only were Saracen (*g*).

Nor should we omit to mention that the intercourse between the Christians and the Saracens of South Italy and Sicily was not always hostile. Frederic II. was specially friendly to the latter; and during the long occupation the Arab trade terms and usages must have become familar in the occupied territories. In Spain this was especially the

(*f*) " The Crusades," by T. A. Archer and C. L. Kingsford, p. 243.

(*g*) For a good condensed account of the commerce of the period and of the great linen trade, see " Egypt " in the " Encyclopædia of Islam," and the German works there referred to. The Arabs were not manufacturers themselves. For an account of ancient commerce in Egypt and the Levant, see " La Vie Privée des Anciens," by Réné Ménard, vol. vi.

case: and many were the treaties of peace and commerce between Aragon and El Mogreb (*h*). So we have the Eastern customs in close contact with the Christian populations not only in the Levant, but in the Peninsula, Sicily and Calabria (*i*).

The magnitude of the trade of the Arabs between the time of Muhammad and the Crusades may be studied in "L'Histoire du Commerce du Levant" (*j*), where we are told of the voyages to India and China, where they established colonies, the trade being temporarily interrupted by the Chinese Insurrection of 875 A.D. The intermediate commerce was not disturbed, and so trade with Indo-China, the East Indies, and India continued. By land the traffic with Persia, India, Bokhara, and Samarkand was great, though the overland trade to China was not important in their hands; the goods for the distant stages being transported by the Chinese themselves (pp. 28-37). They traded also over the South of Russia, chiefly up the Volga and the Don (p. 47). Until the eleventh century both caravans and vessels carried their merchandise along the north coast of Africa, while traders from Arabic Spain and Sicily trafficked to Egypt and the intervening ports; but this reciprocal trade was almost entirely between those of the same religion. The Arab fleets which appeared elsewhere were sailing not for trade but for rapine and conquest (pp. 47, 50).

(*h*) See *post*, pp. 73, 86.

(*i*) Mr. Archer, in his book "The Crusades," gives some reasons for thinking that with all the intercourse between the Saracens and the Christians there was little close acquaintanceship on either side with the literature and learning of the other, and yet in the later times it was customary for Saracen children to be brought up among Christians and Christian children among Saracens. Be that as it may, it has small relation with the intercourse between the native and the visiting traders, who would have had little difficulty in learning the limited vocabulary of each other, so necessary for business purposes, even were interpreters always available.

(*j*) By W. Heyd, tr. by F. Raynaud, 1885.

It was into this rich Eastern trade, which we have briefly sketched, that the Italians and others came to share, the first Genoese fleet, bringing supplies, arriving in 1198, followed by the Pisans and Venetians and the men of Amalfi. Each nation seems to have eventually had its viscount with consuls in several cities for the purposes of self-government and protection, observing their own laws and customs. Whether before this time they had adopted the sea-law of the East or not, it is clear that it soon became part of the law of the Western Mediterranean, and in the latter event affords one more example of the influence of the Crusades in furnishing the West of Europe with the merchant customs of the East. "The establishment of the Latin Empire at Constantinople paved the way for the creation of the Venetian colonial system in the Levant; and the fall of that empire led to the success of the Genoese under Greek patronage in the Euxine. The latter people thus established a caravan trade with Persia from Trebizond; whilst about the same time the Venetians entered into friendly relations with the Saracens of Alexandria, and thus secured the profitable trade of the Nile and the Red Sea. The caravan trade of the Euphrates Valley had already been tapped from the ports of the Syrian coast . . . Venice, as the chief distributing mart of the Middle Ages, became in the fourteen century the southern terminus of a great land trade route. It was on this continental traffic that the wealth of the German and Flemish cities largely depended, and thus the Hanseatic League owed its prosperity, if not its origin to the Crusades. It is noteworthy also that the other great line of Hanseatic development was aided by the Crusading enterprise of the Teutonic knights in Prussia and Lithuania" (*k*).

In his introduction to volume II. of the "Assises de

(*k*) "The Crusades," by T. A. Archer and C. L. Kingsford, pp. 436, 437.

Jérusalem" (*l*), A. A. Beugnot says (p. xxii): "To show by a single example how far the commercial relations of the maritime towns of Syria extended merchants were to be met at St. Jean d'Acre who came from the fairs of Champagne. In their relations with the Venetians, the Genoese, and the Pisans the Latin bourgeoisie derived the taste and habit of the great operations of commerce and banking, and gave itself with so much the more ardour to the fertile labours of industry, as the fleets of these nations came every year to seek their produce and then to go forth to spread them over the principal markets of Europe." He goes on to show how maritime courts were established in all the principal ports of Syria, while the commercial Cours de la Fonde judged according to the decisions of the Cour de Bourgeois, *i.e.*, the law of the Normans. That he should say that the ancient Syrian customs were ignored in the latter court is a testimony to their distinct existence in the common practices of the country.

It has thus been shown that the commercial renaissance of the Mediterranean was due to the Crusades and the direct intercourse of the Italian and other nations with the marts of the Levant and the Black Sea. Now, the law of the merchants, administered by their own consuls, was not in any sense statutory law. It was customary law, *i.e.*, the habitual practice of merchants of all lands enforced in a summary manner by officials familiar with trade. There was no substantial difference in the customary law in the various trading nations; but the question still remains as to its origin. It appears all at once, like Minerva sprung fully armed from the brain of Jove; but although this great commercial development was new in European hands, it was of centuries' standing in the hands of the Eastern nations. Is it not reasonable to assume that with the capture of the

(*l*) As to these, see "Stubbs' Mediæval and Modern History," xc. Introduction to the Itinerarium, 166-8.

Eastern trade the Western merchants adopted also the customs under which it had been conducted for ages past? We must not forget that at this epoch the vital circumstances of trade did not change. The traffic of the fairs was, and long continued to be, the only wholesale trade in the international sense and the needs of the fair did not alter with its development in other lands. The same class of contract required the same interpretation. The same wrongs demanded the same remedies.

It is not, however, to be supposed that all the law merchant came from the East. How much came from that quarter we may never know; but we should bear in mind the fact that it was customary from the oldest times —indeed it was necessary—that traders travelled with their goods, and carried with them the trade customs and market customs with which they were conversant. At the same time, we must not forget that similar circumstances giving rise to similar legal problems are apt to be solved in the most convenient way; that is to say, in the same way in all countries.

We must not ignore the fact that up to the time of the trade revival, which began during the early Crusades, the Canon law, and not the Roman law proper, was the prevailing authority and would tend, more than the latter, to favour simple good faith unhampered by formalities, and thus would extend its influence to the law merchant, which, until damaged by legislation, rested on mutual confidence and good faith to an extent unknown in civil life. In this connection it should be remembered that in the Middle Ages the Church was a very considerable trader.

The very considerable overland trade of the Arabs is attested by the finding of quantities of Arab coins in the countries of Scandinavia and the northern parts of Russia, in and through which the Vikings raided and traded. Thus,

on the Island of Götland alone, Professor Bugge reported, about 30,000 Arab silver coins have been discovered, most of them from Central Asia, and dating from the tenth century (*m*); while Du Chaillu (*n*) states that some few such coins have been found in Norway and many, dating from 698 to 1010, in Sweden, Russia, and Götland, proving trade with Bokhara, Samarkand, Bagdad, Kufa, etc.

In order better to appreciate the Arab influence on the Mediterranean trade, it is material to note that a great number of Arab words, mostly concerned with commerce, were incorporated in the French language during the later Middle Ages. While they usually have their counterparts in the language of Spain, there is no evidence that they entered France from that quarter. Though some of these words are to be found in English, the equivalents in that language are omitted here, but it is suggested that some of the sea terms, the origins of which were unknown to the compilers of some English dictionaries, may have come from the East, the very source that appears most probable. The shipping and trade words are given, among many others, in a book by Henri Lammens, S.J. (who had before him the works of Dozy and Equilaz), called "Remarques sur les Mots français derivés de l'Arabe," published at Beirut. They are, with some additions: *amarra*, *avarie*, *amiral*, *barge*, *barque*, *cable*, *calfater*, *caramoussal*, *caraque*, *chalaud*, *chaloupe*, *corvette*, *darse*, *douane*, *fanal*, *felouque*, *gabare*, *guider*, *jonque*, *laskar*, *mahonne*, *mistic*, *patache*, *ramberge*, *recif*, *risque*, *simoun*, *siroco*, *typhoon*, *tarida*. This list may not be exhaustive. There are many other words which might be quoted, including eighteen concerning money, weights and measures, as well as such words as *dame-jeanne*, *farde*, *fardeau*, *fonde*, *fondouck*, etc. The names of stuffs and Eastern goods abound, and, of course, the words *aval*, *tarif*,

(*m*) "Saga Book of the Viking Club," vol. vi., p. 18.
(*n*) "The Viking Age," vol. ii., p. 219.

and others, as well as numerous technical words of scientific import.

Europe may be indebted to the East for the earliest form of shipping document, as well as for the law merchant generally, as practised by merchants from the early times of the Assyrian and Babylonian kingdoms. She is, at any rate, the debtor of the Chinese for the invention of the compass, although it was left to the Arabs to adapt it for the purposes of navigation, about the year 1100; while she is indebted to the latter also for the astrolabe, these both coming into general use both East and West about 1200 (*o*). Thus, once again the Arabs were the channel of a great good, and this at the crucial time, viz., the time of the Crusades.

(*o*) "Géographie d'Aboulfeda," by J. T. Reinaud. *Cf.* "Pardessus," ii., cxxviii.

CHAPTER II.

The Law Merchant.

The word "merchant" strictly meant a person who dedicated himself to commerce, but the commercial courts often tried cases where one solitary act of trading had taken place; though this was an assumption of jurisdiction contrary to the claims of the civil courts. There seems to have been less dispute where this solitary act was that of one party to the transaction while the other party was a regular trader, so that all fair business came under the fair courts. It must also be indicated that persons coming under the general title of artisans, making articles to sell again, were regarded as merchants, as may be seen in Toubeau (*a*), and as appears in the English Act of 1609 (*post*, p. 22). So in the present German Commercial Code a division is made between *Vollkaufmann* and *Minder-Kaufmann*, the latter including artisans and persons engaged in a small trade, though of sufficient importance to come within the definition of mercantile trader, or *Kaufmann* (*b*).

If, for the moment, we exclude from consideration the codes which deal exclusively with shipping law, such as the Laws of Rhodes, the Rolls of Oleron, the Consulado del Mar, and others of like nature—a course which it is proposed for the most part to follow, since sea-law has been the subject of much writing—we are left with what is now generally found in commercial codes without the accretions which in the course of time have increased the number of subjects or added to their details. In this relation we cannot overlook

(*a*) "Institutes du Droit Consulaire," book i., tit. xv.

(*b*) H. G. B., arts. 1-4. See "The Principles of the German Civil Law," by Dr. E. J. Schuster, K.C.

the admirable introduction contributed by the late Sir John Macdonell to the tenth edition of Smith's Mercantile Law: "In many ancient, and even in some modern authorities, the *lex mercatoria* is spoken of as a form of private international law. This language was once correct. The statement made by early writers . . . . that 'The law merchant is a branch of the law of nations' sometimes meant no more than that it was free from certain technical rules of the common law. But it also recorded the fact that mercantile law grew in great degree out of the transactions between different nations, and that it was, to a large extent, the earliest form of private international law. . . .

"Undoubtedly there was a time when the *lex mercatoria*, though the law of England, was also the law of other nations, and was the law of England because it was the law of other nations. Undoubtedly, too, it was administered in a manner different from that in which the common law was administered—in a manner similar to that in which the Prætor Peregrinus administered the *jus gentium*."

The writer then classifies the origins of the *lex mercatoria* as the Roman law, the maritime *coutumiers* and the law of the mediæval European fairs.

The present author is inclined to the view that, seeing that the disused study of Roman law did not recommence until about the year 1050 (*c*), but little was originally due to this source, and would regard the usages of the fairs as the true and transcendental spring from which flowed the present law of the merchants.

The first growth of law from primitive custom is summarised by Sir Paul Vinogradoff in the following words: "Neither succession, nor property, nor possession, nor contract started from direct legislation or from direct conflict. Succession has its roots in the necessary arrangements of

(*c*) Vacarius was teaching in England in the middle of the twelfth century and published his *Liber pauperum* for the use of poor students in 1149.

the household on the death of its manager, property began with occupation, possession is deducible to *de facto* detention, the origins of contract go back to the customs of barter. Disputes as to right in primitive society are pre-eminently disputes as to the application of non-litigious custom " (*d*).

There is some initial obscurity as to what in truth constituted or now constitutes the substance of the *lex mercatoria*, but it may best be defined as the law administered as between merchants in the consular or commercial courts, some of it being substantive law and some rules of evidence and procedure. Much of it survives in modern systems as parts of commercial codes, while the courts themselves have become obsolete or merged in the commercial courts of the different countries. The consular courts were of two sorts, the one being ambulatory, each group of national merchants attending the fairs with their consuls, and the other fixed at different great commercial centres, where the appointed consuls had permanent jurisdiction over their nationals (*e*); while in other countries, as in France, the jurisdiction over the fairs was the prerogative of the lord.

It would be a mistake to limit the law merchant as applied in England to a few outstanding matters; but at the same time one must beware of extending the definition too far, as is done sometimes by those who have regard to the transaction rather than to the actors in it. Observing the similarity between our commercial law and the law of France as applied in the commercial courts, the true descendants of the fair courts, the right inference is that, taken as a whole, our commercial law, while rejecting some doctrines, did and does embody the law merchant, understood in other countries as constituting a distinct branch of law and not as part of the common law. It is due to this conception that commercial codes are usual, being the law

(*d*) " Historical Jurisprudence," vol. i., p. 368.
(*e*) See " Consulados," *post*, p. 84.

as administered in the commercial courts—an institution quite modern in this country and perhaps not entirely sure of the area of its jurisdiction. In all countries which distinguished between the commercial law and the civil, confining the former to special courts, there was for long years a continuous warfare between the civil and commercial judges over the extent of the jurisdiction of the latter; nor has this jealousy yet died out. There have been a few reported cases in England over what constitutes a commercial cause under the following rule made by the judges of the King's Bench in 1895: "Commercial causes include causes arising out of the ordinary transactions of merchants and traders; amongst others, those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking and mercantile agency and mercantile usages." In addition to this list of subjects, there are some commercial matters which before the constitution of the commercial court had already been assigned to certain other courts—thus maritime cases come before the Admiralty Division, company cases and the liquidation of companies and partnerships are assigned to the Chancery Division, while ordinary bankruptcies are dealt with in the Bankruptcy Court.

It is true that some uncertainty exists as to what matter is commercial and what civil, but there would be less confusion if it were always realised that the law merchant only applies as between merchants when concerned in mercantile transactions. Therefore the fact that a trader buys a house in which to trade does not involve the law of the merchants any more than a purchase of bread to feed his staff or the employment of a plumber to repair his frozen pipes. But if the inquirer takes the trouble to follow out the incidents of a mediæval merchant's life, as a thing separate from his life as a citizen, no great difficulty should present itself. He begins, let us say, as a partner in a firm at Genoa with the possession of goods of which he wishes to dispose;

whether he has manufactured them, grown them, or bought them is, for the present, quite immaterial. He wants to get them to market. He must, therefore, pack them or get them packed. He must then insure his goods against all risks for which the carriers are not liable or borrow on a contract something like a *respondentia*. If in want of ready money to pay cash for the goods, he will already have drawn a bill of exchange to be attached to a through bill of lading, if he can get one, will discount the former with a money-merchant, a discounting house or a bank, and with the proceeds will pay for his goods, if they were not his own manufacture. If he needs money at another centre of trade and fears pirates or robbers or other land or sea danger, he may hand a sum of money to an exchange merchant, who will give him a corresponding bill of exchange, drawn payable at the place of arrival. He must arrange for transport of his goods by land and sea, unless himself the owner of the means of transport, and this must be repeated on reaching land in safety. If cargo has been jettisoned he must pay or receive his proper proportion of the general loss. Arrived at the fair grounds, his consul will point out his location where his booth is to be erected. His sales at the fair are all for cash, if retail; but if between merchants it may be that there will be a set-off which, at the end of the fair, will show a balance owing which it may not be convenient to settle at once. The exchange merchants will accommodate a trader of repute and will discount his promise to pay, or his creditor will be content with the written promise to pay in the currency in use at the next fair they are to attend or at their home town or elsewhere at a named date. Before the end of the last fair he means to attend, our merchant has replaced his goods with return commodities, to be sold when he reaches home. He may have travelled through France and reached the great fair of Bruges, where he has found a fine supply of cloth made from Scotch or English wool and of furs from the Baltic.

Being in no hurry, the prudent trader ships his goods on a Genoese vessel, which is slower but less expensive than a team of pack animals eating their way through France. If his transaction result in insolvency he has the benefit of liquidation. So far his life as a merchant. But his ordinary civil life has gone on all the time. He has had to live on board ship and at inns, to feed himself, to clothe himself, to enjoy himself, and get his hair cut, but all such things he has done as an ordinary mortal and not as a merchant. So we see that, strictly speaking, a case in the law courts is not mercantile unless it is between merchants and concerns their legal relations arising from a mercantile transaction—both these elements should concur.

No account of fair-law and its administration in England would be complete without the note contributed by the late Professor Maitland in his "Select Pleas of the Manorial Courts" (p. 132): "In Edward the First's day the *lex mercatoria* was already conceived as a body of law differing in some respects from the common law. In Edward the Second's day two merchants fell out about a point of pure law raised in the court of the fair of St. Ives and the case was brought before the King's Bench; twelve merchants were summoned from each of four towns, London, Lincoln, Winchester, and Northampton, to testify to the law. How large a body of definite doctrine there was bearing the name of 'law merchant' it is hard for us to say. Probably in some respects it took a more liberal and modern view of contractual obligations than that which was taken by the common law. For instance, we shall in our extracts read of an obligatory writing payable to bearer, and certain it seems that such writings were becoming common among merchants . . . . " (*f*).

In his "History of English Law" Mr. W. S. Holdsworth says that, although the custom of merchants was recognised as a law apart from the common law, the relation between

(*f*) See *post*, p. 56.

them was close. "At an early period the law merchant, so far as it applied to domestic transactions, showed signs of becoming absorbed in a common law which had adopted certain of its rules . . . It is not surprising to find that in the latter half of the fifteenth century the court of pie powder was declining in importance. . . . But the important principles of commercial law were applicable mainly to the large transactions of foreign trade; and the common law courts had at this period no jurisdiction over contracts made or torts committed abroad," *i.e.*, at least to the end of the fourteenth century (pp. 537-544).

Mr. W. Mitchell in his excellent work on the Law Merchant, with special reference to the development in Northern Italy, calls attention, as do other writers, to the embodiment of merchant and other customs in the local *coutumes* or statutes. "In every land during the twelfth and following centuries the towns begin to record their laws and customs, which everywhere contain legal rules for commerce that differ from the common law of the land. . . . As original authorities for the early history of the law merchant the Italian commercial statutes are invaluable. In most, though not in all, of the Italian cities commercial law is to be found mainly in the statutes (*g*) of the Merchant Gilds. . . . Once confirmed (*h*), tacitly or expressly, they had all the authority of state law, binding on all who traded within the city."

"As heads of the gild, the *consules mercatorum* administered the law, but the city magistrates were under a strict obligation, to which they had to swear on entering upon their office, to aid, if necessary, the gild consuls with all

(*g*) Interested students must not confine their attention to these statutes, since there exist several volumes giving the decisions of the consular courts of Venice, Genoa, Naples, etc., while others have still to be collected. See "Scaccia, Marquardus, Stracha, etc."

(*h*) Confirmed, that is, by the general council of the gild and by the city authorities. The *fueros*, granted by the kings of Castilla, served much the same purpose.

the powers of the state in securing the execution of their judicial sentences" (pp. 28-32).

Referring to Gross's "Gild Merchant," Mr. Mitchell says (p. 35), "While in Italy the law of each city was at first mainly of native growth, showing few signs of direct imitation of other city codes, in England, France and Germany the town costumals were, broadly speaking, based upon those of a few leading cities. The costumals of Lübeck, Magdeburg, Köln, Frankfurt and Soest were transferred to towns in every part of Germany, while in France Lorris served as a prototype for 300, Beaumont for more than 500 towns. For its municipal laws Wales went to Hereford, Ireland to Bristol or Breteuil, while Newcastle was one of the principal sources of Scotch burghal law."

Distinctive Elements in the Law Merchant.

Now, it is above all things necessary to bear in mind that the courts enforced the custom of merchants and the customs made the law: and we may as well remember that the two great distinctive elements in the merchants' law, as enforced by their own courts, were good faith and despatch, for speed and honesty must be obtained, though by means not sanctioned by the common law, which was and ever has been a laggard, and by its halting procedure hinders the rapid course of commercial justice. Now the chief distinctive points to be noticed in the law of the merchants are these:—

1. Although a solemn obligation undertaken in a notarial document took general precedence over one under the sign manual, among merchants this rule did not obtain, the assigned reason being that among merchants good faith was paramount, and was not improved by notarial attestation; a rule which was later altered by legislation in France (*i*).

(*i*) "Institutes du Droit Consulaire," book ii., p. 2, by Toubeau, judge of the Consular Court of Bourges, 1700; an authority to which frequent reference will be made. That a nudum pactum binds merchants, see Marquardus, p. 262.

2. Vocal evidence was admitted to contradict a written document where the sum in dispute was above 100 livres, though the sole evidence of the party was insufficient (*k*).

3. The property in the thing sold passed to the purchaser without delivery (*l*).

4. In the absence of an inconsistent agreement, goods are sold according to local custom, when not sold at fairs, and the usual terms of credit must be observed (*m*).

5. An unpaid vendor has a lien on the goods in the hands of the buyer and on their unpaid price in the hands of a sub-purchaser (*n*).

6. Partnership constituted a relationship between partners which differed from that in Roman law; thus, each partner, as respects third parties, was agent for the partnership, and could bind it even when acting alone. Again, joint and several liabilities existed in respect of partnership transactions. No partner could avail himself of the benefit of *discutio*, nor could their sureties (*o*).

The above rules, except as regards *discutio*, are similar to those in the German law (H. G. B. 114, 117, 125-8), and with some modification to English law; and it would seem that the Muhammadan law, the law of the Arab traders, is the same for ordinary general partnerships (*p*). And this

(*k*) "Institutes du Droit Consulaire," book ii., tit. I., ch. 8.

(*l*) *Ib.* p. 10. See *post*, p. 28.

(*m*) *Ib.* book i., tit. 12.

(*n*) *Ib.* book ii., ch. 5.

(*o*) *Ib.* tit. 1, ch. 7; tit. 3, ch. 2; Marquardus, p. 299. For the exceptional Roman Law provision as regards bankers, see "Novellae," 136, 1.

(*p*) "Principles of Muhammadan Jurisprudence," by Abdur Rahím, pp. 1, 323. It is instructive to observe that the rights of *tanteo* and *retracto*, sometimes translated "pre-emption," which still exist in Spain, were an inheritance from the Moors. A co-owner or partner has the prior right to buy partnership property and shares which are for sale and, within strict limits, to supplant an actual purchaser. See "Code Musulman," arts. 873, etc., by Khalil ibn Ishak, and "Principles of Muhammadan Law," by Judge Tyabji, p. 470. "Código Civil de España," art. 1522.

may be another instance of an Eastern origin of parts of the law merchant.

7. Verbal partnerships were sufficient. While there were local ordinances in France requiring them to be contracted in writing, it was only by the Royal Ordinance of March, 1673, that this was made general (*q*).

8. The limited partnership, or *société en commandite* (see *post*, p. 77) was introduced and became common.

9. Differing from the Roman law, the law merchant treated the ordinary paid mercantile agent as a mere piece of machinery causing legal relations between his principal and the third person, when properly acting in his master's business and on his expressed account. He had no independent rights or liabilities of his own (*r*).

This agrees with the English law and the French and Spanish law (*s*). By Muhammadan law agency is allowed in all matters of business, and an agent binds his principal, though unnamed, in sales, hirings and compositions, and the latter has the benefit of the contract. In contracts of loan, pledge, bailment and partnership the principal must be named in order to be bound. Partnership is a consensual contract (*t*).

10. Formerly there was no prescription as between merchants, but it would appear that this exception has everywhere disappeared, "sed praescriptio est iniquissimum juris subsidium" (*u*). According to the strict theory of the Muhammadan law, a thing that belongs to another cannot be acquired by mere possession, however long; in other words, there can be no acquisition of property by prescription (*v*).

(*q*) Toubeau, book ii., tit. iii., p. 92.
(*r*) Toubeau, book ii., tit. 4, ch. 2.
(*s*) See "Code Civil," book iii., tit. 13, ch. 2. "Código Civil," book iv., tit. 9, cn. i.
(*t*) "Muhammadan Jurisprudence," by Abdur Rahím, pp. 321-2.
(*u*) Toubeau, book ii., tit. 1, ch. 10.
(*v*) "Muhammadan Jurisprudence," by Abdur Rahím, p. 281.

11. It being from ancient times the universal custom of merchants to keep accounts, both in journal and ledger form, these books were admissible in evidence on proper proof of regularity in favour of their owner's claim. This law finds a place in article 1329 of the Code Civil, as interpreted by a decision of the Cour de Cassation of October 24, 1890 (*w*).

That a statement in his own handwriting could be any evidence at all in his favour when adduced by himself against an opponent, who was not a party to the entry being made, is remarkable, and a tribute to the general good faith of merchants.

By the Roman law the alleged debtor must have consented to the entry (*x*).

Referring to the growth of the law merchant in the cities of Greece, Sir Paul Vinogradoff says: "The law was based on constantly recurring business arrangements, and on the fact that the courts accepted the documents as conclusive evidence. . . . Customs originating in agreements between shippers, merchants, bankers and crews gathered force, and were supported by the tribunals" (*y*).

That, following on the law of the fair, the common law of England admitted the books of the claimant when properly kept as evidence in his own behalf is clear from the Act of 1609, 7 Jac. I. c. 12, to avoid the double payment of debts, an Act which restricted the right of action by a tradesman or handicraftsman to one year from the debt being incurred: "Provided always, that this Act or anything herein contained shall not extend to any intercourse of traffick, merchandizing, buying, selling, or other trading or dealing for wares delivered or to be delivered, money due, or work

(*w*) Toubeau, book ii., tit. 2, ch. 1-3. "Quod libris apotecariorum non credatur, nisi per quinquennium, sed libris ordinariis credatur, sicut antea." *Index omnium materiarum quæ in Venetiarum Statutis continentur*, 1548, 17 August, 1466. See Marquardus, p. 440.

(*x*) Hunter's "Roman Law"—"Expensilatio."

(*y*) "Historical Jurisprudence," vol. ii., p. 82.

done or to be done, between merchants and merchants, merchant and tradesman, or between tradesman and tradesman (*z*), for anything directly falling within the circuit or compass of their mutual trades and merchandize, but that for such things only they and every of them shall be in case as if this Act had never been made; anything herein contained to the contrary notwithstanding" (*a*). Note that this Act did not interfere with the same right as against a private customer in actions brought within the year (*b*).

12. Interest, though generally illegal, was lawfully charged on loans made at fairs; and, under the head of damages, on unpaid accounts (*c*).

13. Separation of the assets of husband and wife was not allowed, unless certain publications, prescribed by some coutumes, were observed (*d*).

14. Also the following matters were judged by the commercial law: bills of exchange, mercantile agency (*e*), shipping, carriers (*f*), transport, and insurance. Insolvency

(*z*) *Trade* means a course, way or manner of life: specially a skilled handicraft. The primary meaning of "tradesman" is "one who is skilled in and follows one of the industrial arts; an artificer, an artisan, a craftsman." This is still the meaning in Scotland and Australia. Murray's Dictionary.

(*a*) Amended and made perpetual by 26 & 27 Vict. c. 125.

(*b*) As to mediæval law and practice in regard to accounts, see an excellent article by David Murray in "The Journal of Comparative Legislation," 3rd ser., vol. v., p. 63 (1923).

(*c*) Toubeau, tit. 5 and 6. See *post*, p. 59.

(*d*) *Ib.* tit. 19.

(*e*) See Marquardus, p. 306. For an old form of power of attorney, see Appendix.

(*f*) According to the slightly altered translation of Mr. Boscawen in "The First of the Empires," Article 112 of the Code of Khammurabi says:—"If a man sets out on a journey, and gold, silver, stones or any property is given him in his possession to take for transport, and that man does not deliver the property given him for transport to the place of transport, but takes it to himself, the owner of the transported property shall take that man to account in regard to the transported property which he delivered not, and that man shall give to the owner of the carried goods fivefold the property that was given him."

of traders, including letters of respite, *cessio bonorum*, and bankruptcy, were subject to the same jurisdiction.

15. Rescission of contracts of sale on the ground of *laesio* was general before the French Revolution, but now is allowed only in partitions of inheritances and sales of immovables. In Spain, by art. 344 of the Code of Commerce, mercantile sales cannot be set aside for this cause; but of course in all countries fraudulent contracts are rescindable, while by Muhammadan law gross inadequacy of price involves the inference of deception (*g*). By Italian and Canon law sales can be rescinded when the *laesio* amounts to one-half of the value (*h*).

The germ of the corcordat or arrangement with trade creditors may be found in the liquidations as practised at the fairs of Champagne (*i*).

The *cessio bonorum*, invented by the Roman Lex Julia, seems to have been the precedent mainly followed in cessions as practised in the fairs. Such a relief was only available to honest traders, who were thereby saved from infamy, though not from disgrace; though in gross times it was accompanied by repulsive ceremonies which were later abandoned. The trader had to reveal on oath the whole of his assets, which were taken and sold, reserving to him only scanty clothing and bedding and in some places the implements of his trade. He had also to swear that he would pay his debts in full, if he should come to greater fortune (*k*).

The above list, though not exhaustive, is sufficient to show the chief differences between the law of the merchants and the common law. Many of the matters never affected the law of England, but it would, perhaps, not be

(*g*) Abdur Rahím, p. 286.

(*h*) Civil Code, art. 1529. "Decretales Gregorii ix.," book i., tit. 41; book ii., tit. 17.

(*i*) Huvelin, p. 494. Toubeau, book i., tit. xxi.

(*k*) Toubeau, book ii., tit. xi.

excessive to claim that the passing of the property in a moveable by the consensus without delivery, and the probatory power of merchants' books and the law regulating the insolvency of traders before the year 1861, must have been influenced by the law merchant. Of course, the decisions in the courts of pie poudre were in general accord with what was consistent with good faith and with the custom of merchants in this realm as proved in those courts.

According to "The Little Red Book of Bristol," which in this respect is surely insufficient, the only differences between the *lex mercatoria* and the common law were three: "In genere primo quod celerius deliberat se ipsum. Secundo quod qui plegiat aliquem ad respondendum de transgressione, convencione, debito seu catallorum detencione, plegiat totum debitum, dampna et expensas querentis. . . . Et tercio modo differt in eo quod non admittit aliquem ad legem in parte negativa, sed semper in ista lege querentis est probare, ut per sectam vel per factum seu per utrumque et non defendentis." So that it was recognised that the procedure must be summary, that whoever pledged his law had to give security not only to meet the judgment for the money or thing in suit but for damages and costs, and that the burden of proof, which was regarded as a benefit, was always on the plaintiff (*l*).

Note on Custom in Muhammadan Law.

In England we are habituated to use the word "custom" in more than one sense, even speaking of the custom of a trade when we, as most other nations do, should tell of usage, which is a distinct thing in foreign law, and kept distinct. Thus, "custom properly so called should be distinguished from usage of a particular trade or business.

(*l*) As to the latter, see Holdsworth's "History of English Law," 3rd ed., ii., 107, and Pollock and Maitland's "History of English Law," book ii., ch. ix., s. 4.

The latter from its very nature need not be prevalent among people generally. . . . Nor would a usage have the force of law, so long as it is confined to a particular locality, such as a village or a town, and has not found general vogue in the country in which the question arises " (*m*).

Again, " In the case of those customs and practices which prevailed in the time of the prophet, when revelation, the recognised primary source of laws, was still active, and which were not abrogated by any text of the Qu'an or Hadith, the silence of the divine legislator is regarded as amounting to a recognition of their legal validity. And, as to customs, which have sprung up since the prophet's death, their validity is justified on the authority of the text which lays down that whatever the people generally consider to be good for themselves is good in the eye of God. Thus the conception of law as an emanation from God is said to hold good in the case of customary laws as well " (*n*).

The law could hardly be more clearly expressed than in the report of a case—Appel No. 93—in the Algiers Court: " La coutume est le fait du commun des hommes. . . . Les Imân ont, implicitement ou explicitement, indiqué un certain nombre de matières; testament, serment, contrats, dans lesquelles le juge doit se conformer à la coutume. Dans ce domaine, mais dans ce domaine seulement, le jugement doit suivre la coutume et évoluer avec elle " (*o*).

Khalil ibn Ishak, in his work on the Mussulman Code, to which reference has already been made, compares the older Arab laws with the customs of India, noting their close resemblance. He also thinks that the early Mussulman jurists borrowed much from the Laws of the Twelve Tables, but the most interesting of his suggestions deal with the improvements in the older law carried out by the laws of

(*m*) " Muhammadan Law," by Abdur Rahím, pp. 136, 137.
(*n*) *Ib.* p. 55.
(*o*) " Recueil de Jurisprudence Chérifienne," by Louis Milliot, 1920.

Muhammad, among which we note, as most relevant to our purpose: 1. The transfer of property in sales which are perfect by mere consent, without the aid of delivery. 2. Wise theories on the risks of the thing sold, the guaranty against defects, partnership *en commandite*, and the industrial partnership (p. xxxii).

CHAPTER III.

The Contract of Sale.

In the law merchant, as we have seen, sale is a purely consensual contract (*a*), the property in determined objects passing without delivery, so that after the consents have been communicated, whether by writing, word of mouth, or conduct, the risk of the thing sold rests in general on the buyer.

In the Roman law, while the risk was on the buyer from the time of the contract, the property in the chattel sold did not pass, even after delivery, until the price was paid (*aa*), but then the Romans were not distinguished as merchants.

The law of the merchants in France suffered a change for the worse under the influence of the restudied Roman law, and the contract of sale gave the buyer but the right to delivery, until article 1582 of the Code Civil restored the consensual sale, not quite clearly by its terms, but quite evidently according to the universal interpretation (*b*).

The civil laws of Spain and Italy are similar, and the same law is enshrined in the British Sale of Goods Act, 1893, s. 1.

Our chief author, M. Toubeau, is quite clear on the effects of consent in contracts between merchants, whose duty it is to observe good faith, although no writing has passed. "That is so true that by the common law, from the moment that the price is settled, the sale and purchase are

(*a*) See Marquardus, p. 280.

(*aa*) Hunter's "Roman Law," *Traditio*.

(*b*) Baudry-Lacantinerie, xix., 9, etc. Proof by witnesses, usually restricted, is allowed in respect of all commercial acts; so that writings of any sort are not required (*ib*. section 2576, etc., Code du Commerce, art. 109), except where specifically ordained.

so perfect and consummated that the risk of the thing is on the buyer." But this fact, at any rate by the law of the merchants, does not prevent a seller who has not been paid from following the thing sold and reclaiming it in the hands of the buyer and those of any but a third purchaser of good faith (*c*).

And it is to be observed that, when sales are perfected by consent, it is almost necessary, in order to protect the unpaid seller, that he should have a lien while the goods remain in his possession and the right to follow them after delivery. When a sale is perfected by delivery, the necessity does not exist to quite the same extent. Note, however, that, in the absence of special contracts, all sales at fairs and markets were cash sales. Outside the fairs, the local terms for credit would apply as between merchants.

When we turn to the commercial law of Spain, where the law of the Arabs had direct influence, we find that the contract is perfect by the consent of the parties; the subsequent damage and deterioration suffered by the merchandise after the contract is so perfected, and the seller is holding the goods at the disposal of the buyer, is borne by the latter, except in the case of fraud or negligence of the seller (*d*).

And so long as the sold goods are in the control of the seller, although as a deposit, he has "preference over them as against every other creditor, in order to obtain payment of the price with the interest occasioned by the delay" (*e*).

In the Muhammadan law the contract completes the legal relations, though the buyer cannot demand delivery until he has paid the price, the property meanwhile being subject to the vendor's lien for the unpaid purchase money, unless, of course, the sale was on credit (*f*).

(*c*) Book ii., pp. 10, 21. Nothing is said about stoppage *in transitu*.
(*d*) Art. 333 of the Code of Commerce.
(*e*) Art. 340.
(*f*) "Muhammadan Jurisprudence," by Abdur Rahím, pp. 283, 296. Chapter i., section 1, article 1 of the Musulman Code says :—"The sale

But we must be careful in not ascribing to Arab influence the whole credit for the recognition of the binding nature of consensual contracts, for this was observed also among the Goths and in early German law (*g*), and by the Canon law (*h*), and became embodied in the Costums of Tortosa and in others which followed that model (*i*). So that we find the Muhammadan, Canon and German early laws all agreeing on the enforceability of the consensual contract; and it must be said that this view of the relations between consenting parties is the only one consistent with honesty, though the requirement of writing and even of notarial contracts has been defended as conducing to the like result. Even our Statute of Frauds has found apologists who were influenced by the same reasoning. Such formalities are offensive to merchants, if made obligatory.

It has been said elsewhere that fair contracts were bound to be notarial (*k*) in Champagne from 1326 onwards, though inability to write must have made many careful merchants employ the services of a notary from the first. Mitchell, in his "Law Merchant," says that by the middle of the thirteenth century notarial contracts were common in Italy, and that by the middle of that century Genoa had 200 notaries, Pisa at its close nearly 300, Milan, in the following century, well over 500. A single Marseilles notary seems to have drawn up in a single year (1245) more than 1,000

is perfect by the mere consent, etc." "Le Code Musulman," by Khalil ibn Ishak, tr. by N. Seignette into French.

(*g*) "Roman Law in England," by Sir P. Vinogradoff, p. 119.

(*h*) "Decret. Greg. lib. iii.," tit. xv., c. 1.; tit. xvi., c. ii.; tit. xvii., c. i.

(*i*) "Historia del Derecho en Cataluña, etc.," by B. Oliver y Esteller, vol. iii., p. 125. Costums l. iv. cost. i.

(*k*) Students will note that in other systems than ours it is not usual to treat a document as creative or transferative of a right. Where required by law, they are generally evidentiary, the actual creation being consensual. A good instance may be found in art. 109 of the French Code de Commerce. "Purchases and sales are proved (1) by public documents, etc." These accompaniments, even where obligatory, are but "solemnities" and not operative instruments.

commercial documents; while one notary drafted nearly sixty in a single day. The uniformity of language did much to fix and generalise mercantile customs (p. 108).

Earnest-money.

It is not intended in this place to enter into any controversy over the nature of earnest-money beyond pointing out a few matters to be considered.

As among merchants a sale was perfected by and at the time of the bargain without any formality, an earnest was never a necessary element in the contract. It was, however, not unusual as a piece of evidence, and the reason for this is sufficiently clear when we picture to ourselves a scene at a fair. Business is done in a leisurely manner, other merchants and attendants of various quality are interested and watch the proceedings and listen to the bargainings. At last an agreement is come to, but if words alone pass the proof is difficult. The buyer hands over a coin, and the seller may hand him his ring. All those present can swear with confidence that a sale has taken place, for they have seen the parties shake hands and give or exchange the earnest. The principals, perhaps, cannot write, otherwise their books would prove the contract. But even in the absence of witnesses the earnest is a valuable piece of evidence when a thing is given which can be recognised. This is vividly shown in the discreditable story told in the Book of Genesis in which his daughter-in-law produced to Judah the signet, bracelets and staff, which she had received as a pledge and detained in self-defence.

As to whether the earnest was part of the price, to be deducted on completion, it seems fairly clear that on the Continent this depended on whether the buyer completed without being sued. If he did, he deducted it from the price; otherwise it was not included in the damages, but was forfeited (*l*).

(*l*) Toubeau's "Institutes," book ii., pp. 6-9.

The late Professor Maitland wrote (*m*): "The tally and the God's penny seem to have been regarded as specially mercantile institutions. Against a tally one could not wage one's law in cases between merchants; royal favour has conceded to them that a plaintiff who has a tally may prove his case: this, says Fleta (f. 137-8), is an exception to the general rule 'in paritate juris prius admittitur defensor quam pars actrix in probatione'; for we must still think of 'proof' as a benefit, not as a burden. . . . The payment of a God's penny was effectual to bind a mercantile bargain. Edward I. in 1303 granted this as a favour to the foreign merchants." "Every contract between the said merchants and any persons whencesoever they come made touching any kind of merchandise shall be firm and stable, so that neither of the said merchants shall be able to retract or resile from the said contract when once the God's penny shall have been given and received between the parties to the contract" (Carta Mercatoria). Very similar words are found in the Custom of Avignon: we are indeed dealing with the "private international law" of the Middle Ages. The God's penny, it is said, ought in theory to have been applied to religious purposes, the purchase of saints' tapers and the like; at Arles the God's penny went towards keeping up a candle for Saint Trophimus; a religious sanction was thus given to the contract. . . . The point of Edward's concession may be that (perhaps under an impression that they were following Roman law) our King's Courts had come to regard the God's penny as an *arra*, and to hold that the payment of this *arra*, or earnest, did not have the effect of making the agreement enforceable, though the *arra* itself was forfeited by the buyer in case he would not fulfil the agreement, and restored twofold by the seller in case the refusal came from him (see Bracton) (*n*).

(*m*) "Select Pleas of the Manorial Courts," p. 132. See also "The History of English Law," by Sir F. Pollock and Prof. Maitland, vol. ii., p. 208 (2nd ed.).

(*n*) Bracton, who wrote after the study of Roman law had recom-

"This, however, was not the merchants' view of the law; the God's penny, in their eyes, was a form which validated the contract. For them sale had become a 'formal' contract; for Bracton it was still 'real' unless it were made by deed. . . . Fleta (f. 127), with Bracton's text before him, points out that the law is different among merchants; the seller is bound by receipt of the *arra* to deliver the sold goods, unless, indeed, he prefers to forfeit five shillings for every farthing of the *arra*—an impossible contingency."

Whether the custom of earnest was of Hebrew origin as well as the name (*eravon*) (*o*), or whether it was common also in Babylonian lands is not certain, but it seems clear that both custom and name were carried by the Phoenicians into Greece and Italy, where the word took the form *arrabon* in Greek, and this was copied in early Latin, though among the jurists the form was always *arra*. Little difficulty would have arisen in understanding the practice and law of the *arra* if it had not been for what appears to have been a legislative innovation by Justinian, found both in the Institutes III. 23, and in the Code IV. 21, 17. In the former he expressly leaves untouched the existing law as to *arra* in unwritten contracts, but in the same paragraph, after dealing with written contracts, he says that, both as to written and unwritten contracts, a defaulting buyer forfeits the *arra* and a defaulting seller pays double the *arra*. This latter provision has occasioned to this day much disputation; but the weight of authority seems to agree that the reference was not to the earlier mentioned *arra* in

menced, held that a sale was incomplete in the absence of earnest-money, a relevant writing, or delivery, and that there was a *locus poenitentae* in the first case, either party being able to resile from the contract, the buyer by forfeiting his earnest-money and the seller by paying double. Book ii., tit. 27. He seems to have confused the two kinds of *arra*.

(*o*) "The Roman Law of Sale," by Professor James Mackintosh, p. 68; Green's Encyc. Scots Law, *arrhae*; and Fry, L.J., in *Howe* v. *Smith* (1884), 27 Ch. D., at p. 102.

unwritten contracts, which is declared to be untouched, but to some other custom by which an *arra* might be paid although no final contract was made. This has been called *arra contractu imperfecta data*, or, as by Hieronymus, *arrabo futurae emptionis quasi quoddam testimonium*.

Here is a surprising custom-earnest paid, but no contract of sale is made. There must be some practical meaning in this arising from the customs of the market. The present author suggests that the explanation is to be found in the fact that trade was, and for centuries continued to be, periodic. Much was concentrated in fairs and marts, the former being held perhaps only once a year, the latter more frequently. The buyer at this year's fair desires to make sure of being able to buy certain goods, handled by a certain merchant, at next year's fair. The trader will provide them without fail if an *arra* is paid him. Note that this *arra* is not a trifle, like the evidentiary *arra*. It is substantial enough to act as a pledge on the part of the buyer and at the same time will go some way to finance the merchant's venture.

It was no doubt from ignoring the facts of trade that so much confused writing has emanated from jurists of all times; and it is curious that in some recognisable form the legislative innovation of Justinian, which surely embodied an existing custom, has survived in the modern Codes which follow the Roman law, an example of which is found in the Civil Code of the French, art. 1590. French writers agree that this applies only in the absence of express or tacit agreement, and that one party cannot resile from a contract if the *arrhes* is of insignificant value, since it can only have been given to bind the bargain (*p*).

The proper conclusion seems to be that originally an *arra* of trifling amount was evidence of a concluded bargain, while, unless it was payment of part of the price, an *arra* of substantial amount was given when no contract had been

(*p*) " Baudry-Lacantinerie," xix., 79-88.

made—that is, no contract of sale. On the one hand there was a promise to afford opportunity for purchase and on the other a promise to avail himself thereof, fortified by a deposited pledge which would become part of the price on the contemplated contract being completed. It is rather like dealing in options. No wonder that in this state of things confusion followed, and that the *arra* of Justinian has been confounded with a deposit as part payment on account of a concluded bargain. Thus, the mediæval sea-law (*q*), for instance, is said to have followed the Roman law, so that the party giving the *arra* could escape liability by abandoning it and the receiver by returning it with as much again; but the author mentions certain statutes of Ragusa and Curzola which make a distinction. If the *arra* is but one *folarus*, a small Greek copper coin, the contract is binding, but if he has given more, the shipowner must content himself with the *arra*. The Constitutum Usus of Pisa, followed in substance by the Statute of Marseilles, provides that where the shipowner has wilfully failed to supply a ship, the merchant may either recover the *arra* and so much again or the actual damage suffered. If the merchant is in default, he is liable for the whole freight less the *arra*.

So Vinnius on the Institutes (*l.c.*) says: "Datur arrha vel simpliciter, ut si argumentum duntaxat et probatio emptionis contractae, veluti si annulus datur: vel ut simul postea cedat in partem pretii, data certa pecunia"; and in Erskine's Institutes (iii., 3, 5) it is said: "Since the question,—In what cases is earnest to be imputed in part of the price?—is never fixed by the parties at giving it, the solution seems to depend on the amount of the sum that is given *eo nomine*. Where it bears no proportion to the value of the subject sold, *e.g.*, a shilling in the purchase of a ship or of a box of diamonds, it is presumed to be given merely in evidence of the bargain, or, in the common way of

(*q*) "Rhodian Sea Laws," by W. Ashburner, ccvii.

speaking, dead earnest; but if the sum be more considerable, it is reckoned up in the price."

The Commercial Code of Spain has got away from the difficulty by enacting, in art. 343: "The sums which are paid in mercantile sales by way of earnest-money shall always be deemed paid on account of the price and are evidence of the ratification of the contract, saving an agreement to the contrary." Perhaps we have here a trace of the influence of the superior honesty of the Muhammadan law by which sales with earnest, subject to forfeiture on failure to complete the sale, are prohibited (*r*).

In Pollock and Maitland's "History of English Law" (ii., 188) is a short mention of the custom of hand-shaking as binding a contract. In the Fuero of Aragon of 1247 this is recognised, with the addition that if a party would resile from the contract he must pay five *solidi* to the other. The same is stated in the Fuero of Navarra, which adds that if he has received earnest-money he must return double, while the curious unissued *For de Jaca* of the fourteenth century says that if the bargain is guaranteed, the guaranty makes it hold (*s*).

In the second volume of "Select Pleas in Manorial Courts," etc. (p. 136), F. W. Maitland gives an account of a case in which Walter Daneys claimed a horse which had been attached when in the possession of Austin by way of security for a court fine. But it was proved that Walter had "earnested" (*arravit*) the horse from the defendant Austin by God's penny on the Sunday before the attachment. "The merchants of the various commonalties and others being convoked in full court, it is considered . . . . that since, according to the law merchant, the said Walter had completed the sale of the horse by the delivery of the God's penny, the said Walter do come third-

(*r*) "Le Code Musulman," art. 79, by Khalil ibn Ishak, tr. by N. Seignette.

(*s*) "Historia del Derecho Español," by E. de Hinajosa, p. 86.

handed (*cum tercia manu sua*) with good and elected and credible men to prove that the said horse is his, so that at the time of the attachment the said Austin had neither art nor part in the said horse. And the said Walter came and made his law sufficiently, therefore let him go quiet with the said horse, and let the said William be in mercy for his false claim; he is pardoned."

Market Overt.

In a contribution to the "Law Times," Vol. 153, p. 428, the present author said: "A sale in market overt of a moveable does in general confer a good title on the *bonâ fide* buyer. So we are taught in our text-books, which, grounding their expositions on 2 Coke's Institutes, 713, set out the rule and the twelve exceptions. Now, what is the origin of the rule? Coke says: 'The common law did hold it for a point of great policy, and behoveful for the Commonwealth, that fairs and markets overt should be replenished, and well furnished with all manner of commodities, vendible in fairs and markets, for the necessary use and sustentation of the people. And to that end common law did ordain (to encourage men thereunto) that all sales and contracts of anything vendible in fairs or markets overt, should not be good only between the parties, but should bind those that right had thereunto.'

"This disquisition of Sir E. Coke is curious and can hardly be correct, as it seems to argue that it was to the interest of the commonwealth that markets should be replenished with lost or stolen goods. Of course, the real reason was quite different, being the encouragement of buyers at fairs and markets—innocent persons, as a rule—who in early times always paid cash or its equivalent, who could have no opportunity at all of knowing whether goods, brought as they generally were from great distances, were stolen or not. Nor would they be likely to know even the attendant merchants, especially those selling at the great

fairs, for they may have come from Italy or France, Flanders or the East. And they had brought their goods at great cost of transport, and after payment of heavy sums for safe conduct; and grievous would have been the result to the traders and disastrous to the toll-taking lord of the fair, if buyers should be harassed and disturbed in their innocent purchases. Buyers were in a difficult position in early times (and the history of the fairs and markets of Western Europe was much the same everywhere), for sales of commodities were at first forbidden except at markets and fairs, and a would-be buyer, prevented by law from supplying himself elsewhere than at fairs and markets, and afraid to buy on the market, would have been in a sad case and perforce confined to the enjoyment of local products. On the other hand, the seller outside the fair was in the position of a contrabandist, and the buyer was his accomplice, which made them both suspected of fraud. As regards the fair tolls, such outside transactions were clearly fraudulent, and the presumption was against them; while in the case of market bargains, the market was itself said to be the guarantor.

"The reasons for this market franchise did not apply to outside transactions, which became gradually tolerated, and this part of the law merchant was not extended entirely to them, though in sales by a bailee in England we find traces of what is expressly stated in the French and Spanish Codes, which apply the law of market overt to certain extra-market sales. Thus, in the Civil Code of the French (art. 2280) we read: "If the actual possessor of a thing which has been stolen or lost has bought it at a fair or market or *in a public sale or of a merchant who sells similar things*, the original owner can only cause it to be returned to him by repaying to the possessor the price which it cost him."

By the Código de Comercio of Spain—"Contracts of sale made at a fair may be for cash or on credit; the former

must be performed on the same day that they are made or at latest within the following twenty-four hours. After the expiration thereof, without either of the contractors having claimed their performance, they shall be considered void, and the pledges, handsel or earnest-money, shall remain in the hands of the person who has received them (art. 83). Questions which arise in fairs respecting contracts made therein shall be decided in verbal action by the municipal judge of the place where the fair is held, in accordance with the provisions of this Code, provided that the value of the thing in litigation does not exceed 1,500 pesetas. If there is more than one municipal judge, the one chosen by the plaintiff shall be competent (art. 84). The purchase of merchandise in warehouses and shops open to the public shall cause an absolute prescription with respect to the merchandise acquired in favour of the buyer, saving the rights of the owner of the things sold to bring his civil or criminal action against the person who wrongfully sold them. For the purposes of this prescription, the following shall be reputed warehouses or shops open to the public: (1) Those established by registered merchants; and (2) those established by unregistered merchants, provided that the warehouses or shops remain open to the public for the space of eight consecutive days, or have been announced by means of posters, samples or titles in the place itself, or by advertisements distributed to the public or inserted in the newspapers of the locality (art. 85). The money by which payment is made for merchandise bought for cash in public shops or establishments cannot be reclaimed (art. 86). The purchases and sales effected in the establishment shall always be presumed to be made for cash, saving proof to the contrary" (art. 87).

What is this but a late amplification of the Fuero Juzgo of 1241 (itself a version of the Visi gothic Code of about 506 A.D.), which says: "If the merchant of oversea ports sells gold or silver to a man of our kingdom, or cloth or

clothing or other things, if the things are bought at a reasonable rate, although they be the proceeds of theft, he who has bought them ought not to incur penalty although they are proved to be stolen." The proper inference would be that the innocent buyer was quieted in his possession.

We may usefully refer to what Blackstone says on the subject (*t*).

"Property may also in some cases be transferred by sale, though the vendor hath none at all in the goods; for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end. And, therefore, the general rule of law is, that all sales and contracts of anything vendible, in fairs or markets overt (that is, open) shall not only be good between the parties, but also be binding on all those that have any right or property therein. . . . Every private contract was discountenanced by law; insomuch that our Saxon ancestors prohibited the sale of anything above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses. Market overt in the country is only held on special days, provided for particular towns by charter or prescription; but in London, *i.e.*, the City of London, every day, except Sunday, is a market day. The market place or spot of ground set apart by custom for the sale of particular goods is also in the country the only market overt; but in London every shop in which goods are exposed publicly to sale is market overt, for such things only as the owner professes to trade in."

But the rule did not originate at the mediæval fairs. The reasons for its existence and its actual origin may and, indeed, must have been as old as the fairs themselves, and it is quite likely that there was little or no borrowing from one system by another, for in all places the same causes

(*t*) Book ii., ch. 30.

must have produced the same results. Khammurabi, who reigned as king in Babylon, died in 1916 B.C., and to him we owe the oldest known code in the world. Two of its articles are material in this relation. No. 280 says: "If a man has bought in a foreign land the manservant or the maidservant of a man; when he has come into the land and the owner of the manservant or maidservant has recognised his manservant or his maidservant, if the manservant or maidservant are natives he shall grant them their freedom without price." Art. 281: "If they are natives of another land the buyer shall tell out before God the money he paid, and the owner of the manservant or the maidservant shall give to the merchant the money he paid, and shall recover his manservant or his maidservant." So in the oldest great trading centres of this world honourable sales were upheld, and there can be little doubt that this ancient law was never substantially departed from.

Eviction and Warranty.

It has generally been assumed that the duty of a selling merchant to warrant the title of his goods was derived from the Roman law, and this may very well have been the case in some degree; but it must be noted that by Muhammadan law the seller guarantees title (*u*), and also that a sale at a fair was in any event a good sale, the fair warranting the title, and this we have seen in dealing with sales in market overt; but what is more important still is the duty of the seller to answer for hidden defects in the absence of a special agreement. This had been ascribed to the edict of the Curule Edile, which is said by Ulpian to have included not only slaves and cattle, but other movables, and even immovables. It has ever been a defect in the English law that this traditional rule was not adopted, but that the opposite doctrine of *caveat emptor* (subject to the

(*u*) "Code Musulman," art. 231, by Khalil ibn Ishak.

exceptions to be found in the Sale of Goods Act) has ruled, to the detriment of the honour of our trade. In Continental countries, and in the republics descended from them, the seller, in the absence of a special agreement, is responsible for hidden defects, *vices rédhibitoires*; and this rule applies not only to sales in markets and fairs, but generally to all sales, wherever they take place. The remedy is either to quash the sale or to diminish the price, a time limit being given for bringing the action.

By the Muhammadan law concealed defects give rise to rescission if claimed within three days of the sale (*w*); for "consent without a knowledge of the thing to which it refers is regarded as incomplete" (*x*). And it is interesting to note that by the Costums (*y*) of Tortosa the Canon and Muhammadan law meet, for it is said by costum XIX. that a vendor is liable for hidden defects, with results which differ according to whether he knew or not, while costum XVIII. enacts that the Saracens had even to state evident defects when selling by auction.

It may be noted that the same rule appears in the Assizes of Jerusalem (*z*), which would tend to show that, at any rate as regards animals and slaves, it was common in Norman countries, though it may, of course, have been adopted of necessity through the prevalent trading with the Saracens of the country to whom the Muhammadan law applied.

The guaranty against latent defects pertains among the

(*w*) "Code Musulman," art. 160, by Khalil ibn Ishak.

(*x*) "Muhammadan Law," by Abdur Rahím, p. 286.

(*y*) *Costum* in France and Spain of the 12th and 13th centuries meant the combination of rights, liberties, franchises and usages which had been acquired by the people : B. Oliver y Esteller, "Historia del Derecho en Cataluña, vol. i., p. 123.

(*z*) Chapters xxxiii.-xxxvi., "Assises de la Cour des Bourgeois," "Assize" is defined by Spelman as "Pro Statuto. Hinc decreta regni, quæ hodie Statutã vocamus, Majores nostri, Anglo-Normanni usque ad aevum Henrici iii. Assisas appellabant."

Kabyles, who observe the Muhammadan law, and so does the right to follow unpaid goods and retake them (*a*).

The Coutumes of France considerably restricted the defects for which sales of animals could be cancelled (*b*).

By article 345 of the Spanish Code of Commerce: "In every mercantile sale the seller shall be bound to warrant the title and against latent defects in favour of the buyer, saving an agreement to the contrary."

By the present German law a sale is completed by delivery, when the risk passes, and as at that time the seller warrants that the thing sold is free from defects impairing either its value or its fitness for its ordinary purposes; but in horses, asses, mules, and cattle this only extends to certain principal defects (BGB. 433, 446, 459, 481-6).

In Italy, besides warranty of title, the seller is bound to guarantee the thing sold against latent vices and faults which render it unfit for the use to which it is destined, or which so diminish this use that the buyer, had he known them, would not have acquired the thing, or would have offered a less price (Code Civil, 1481, 1498).

By the Civil Code of the French (arts. 1641-1649), which as regards domestic animals was modified in 1884, the seller is liable for latent defects in the same terms as in the Italian Code, though he may stipulate to the contrary in the case of defects of whose existence he is not aware.

(*a*) "La Kabylie," by Hanoteau et Letourneux, vol. ii., p. 396.
(*b*) "Droit Coutumier Français (Contrats)," by Henri Beaune, p. 194.

CHAPTER IV.

The Finance of Commerce.

A Merchant whilom dwelt at Saint Denise (*a*)
That richë was, for which men held him wise.
. . . . . .
But so befell, this merchant on a day
Shope him to makë ready his array
Toward the town of Bruges for to fare,
And buyë there a portion of ware.
. . . . . .
The morrow came, and forth this merchant rideth
To Flandersward, his prentice well him guideth,
Till he came unto Bruges merrily.
Now went this merchant fast and busily
About his need, and buyed and creanced.
. . . . . .
This merchant, which that was full ware and wise,
Creanced hath, and paid eke in Paris
To certain Lombards ready in their hond
The sum of gold, and got of them his bond,
And home he went, merry as a popinjay.
For well he knew he stood in such array
That needës must he win in that voyage
A thousand francs above all his costage.

The Shipman's Tale.—CHAUCER.

Exchange, Banking, etc.

The Jews having been expelled from France by Philippe Augustus, their place as moneylenders and exchangers was taken by the Lombards, sometimes called Cahoursins, from the fact that Cahors was the first French city in which the Genoese exchange merchants settled. It is obvious that a complete liquidation of debts contracted at any large fair could not conveniently be effected at the time, so it became

(*a*) There was a great annual fair held at St. Denis, near Paris.

the custom to arrange balances by means of bills or promises to pay at another named fair, by which time the travelling merchant might expect to be in funds, perhaps from fresh sales. Many writers, borrowing it may be from each other, have asserted that the bill of exchange was invented by the expelled Jews as a means of withdrawing their capital left behind in France, referring no doubt to the bill of exchange proper, *i.e.*, an order or request directed to a third person to pay a certain sum. Considering that fairs had been in vogue over large parts of the earth for hundreds of years, one would expect that the use of bills was not entirely novel in the Middle Ages, especially when we remember that coined money was frequently and for long periods a scarce commodity. It is interesting to note that the articles on bills of exchange in the "Jewish Encyclopœdia" suggests a much more probable origin, when it says: "The practice seems to have begun among the Arab traders of the Levant in the eighth century and from them passed to the Italian traders who followed the Crusades" (*b*).

In Grasshoff's book we read: "'Suftajah' means the giving of money or property to another. That other person possesses money or property in the land of the giver, which is paid over to the latter, so that he obtains security" (Note (*g*), p. 80). "The form of it is to hand over to a merchant money on loan in order that he may pay it to his friend in his own country. He hands it over only as a loan, not as a deposit, because that merchant does not pay over the actual money, but merely the script of it, thus it cannot be a deposit: he lends it just in order that he may obtain safety from the danger attendant on travelling. Another view is that he gives a loan to a man in order that the latter may spend it in a country dictated by the lender, that the lender may obtain safety from danger attendant on

(*b*) See Grasshoff, "Die Suftaga der Araber, 1901." This work is reviewed approvingly by P. Huvelin in "Annales de Droit Commercial Français, 1901, vol. xv., I.

travelling: thus it is in the nature of Hawâla (guaranty). This is objectionable, there being a kind of benefit which the lender gains. The Prophet of God forbad lending in order to benefit thereby" (Note (*k*), p. 81). (Tr. from the Arabic.)

"It was also taken up by the Christians of Aragon from the Arabs of Andalusia, possibly by the intermediary of the Jews during the course of the twelfth century, but there is little evidence that its further development was due to the Jews" (*bb*). Although the idea of Grasshoff is of the greatest interest, he gives the go-by to all preceding facts and history. Not only had caravan trade been carried on over the countries between the Sea of the Rising Sun and the Sea of the Setting Sun for a thousand or more of years, but we know that banking (see p. 58) existed at least twelve hundred years before the date assigned by Grasshoff for the invention of bills of exchange. But that this document, and perhaps other commercial documents, were adopted by the Crusading nations from the East can hardly be doubted; and one of the most important proofs of this is to be found in the word *aval*, which is an element in the Italian, French, and Spanish commercial codes, and means the guaranty for the payment of a bill, apart from indorsement, and either on the bill itself or in a separate document. It is obviously the Arabic *hawâla*, and it is thus treated in the dictionary issued under the authority of the Royal Spanish Academy (*c*).

The above-mentioned brochure by P. Huvelin touches on many interesting points, but we may omit the reference to the learned and arid discussions of the great Italian jurists, such as Bartolo and Bardo, who did not know what to make of the foundling, spending much thought and ink in debat-

(*bb*) Jewish Encyclopædia, l. c.

(*c*) It will be seen that the difference between guaranty by *aval* and guaranty by indorsement is that the former is given by a person not liable on the bill.

ing whether a bill involved a sale, or an exchange, or an admission of debt, and so forth. If these undoubtedly eminent authorities had taken the liberty to forget the existence of the technicalities of the newly found Roman law and jostled with the merchants in the market-place, they might have absorbed the ideas of commercial usage and saved Italy from waiting until the sixteenth century before transfer by indorsement was recognised (*d*).

Similar contact with facts, such as bumping on a caravan camel, might have saved some *savants du cabinet* or "philosophers of the chair" a good many ingenious errors. There is much to be said in favour of the old Greek philosophers who discussed their theories in the market-place. The objection in Roman law to the transfer of a debt, even when obviated by a power of attorney which was the first and usual method, was not relevant in this case of transfer by indorsement; or at most there was only the formal difficulty of the right to sue, since the transfer of a bill, being only conditional in the absence of *sans recours*, could not have worked a novation. The fact is that the bill of exchange, of which the post-glossators had no historical experience, required new legal ideas, and could not be satisfactorily bottled in old wine-skins. Even the issue by the debtor to his creditor of a bill amounted to no more than a request to pay. The original debt was extinguished only by payment.

Huvelin in the same article discusses both recourse and protest, pointing out that at first it was for the *drawee* to protest at once that he had not been provided with funds, as retention of the bill involved acceptance. His difficulty about the origin of recourse against the drawer is not clear,

(*d*) As to this Italian delay caused by technical difficulties of the resurgent Roman law, see Goldsmit's "Universalgeschichte des Handelsrechts," p. 448; and Pollock and Maitland's "History of English Law," book ii., ch. v.; and Huvelin (*ubi supra*). As to the bill of exchange generally, see Marquardus, p. 313.

as the mere handing over of a bad bill to the creditor did not work a novation (*e*).

As a general rule, novation is not allowed in Muhammadan law without the consent of the debtor, and so a negotiable promissory note or bill of exchange (*suftaja*) would be invalid if novation were involved in negotiation. "But if a custom of negotiability of such notes or bills is found to exist in a particular country, so that the debtor would know as an implied term of his liability that he may have to discharge it at the instance of the transferee of his creditor, the transaction would be upheld, though it may be regarded as improper, because the consent of the debtor is merely a matter of implication from the existence of the custom" ("Muhammadan Law," by Abdur Rahím (p. 289)). It seems that this law, being of Divine revelation cannot be varied: but it may be developed by the observance of mercantile usage or legal fiction.

But we now know something more of ancient commercial practices. As has already been hinted, it is almost impossible to conceive of caravan traffic after the age of barter had passed without some commerce in documentary credits, the distance to be travelled and the dangers of the routes making bills of some sort imperative. It is obvious that the relics which have come down to us are few, since every great commercial centre of the East has been thoroughly destroyed more than once, and we must still await the finds of the enthusiastic digger to recover much of the lost history of trade. But we are not without instances of early date, for some plaques were some time ago dug up at Karkhemish, one of the ancient Assyrian capitals, five of which tablets are here translated (*f*).

A.—A simple obligation.

(*e*) In his "Foires et Marchés" (pp. 559, 574), Huvelin suggests that endorsement and recourse to indorsers were not permitted until the 17th century.

(*f*) From "La Monnaie dans l'Antiquité," by F. Lenormant, vol. i., p. 113, and "Histoire Ancienne de l'Orient," vol. v., p. 115, by the

"Four minae of silver of the weight of Karkhemish (*g*) (credit) of Nergalsurussur, on Nabuzikiriddin, son of Nabuiramnapisté of Dur-Sarkin, at five silver shekels of monthly interest. The 26 Air, éponym of Gabbar (B.C. 667)."

(The names of the witnesses follow.)

The interest works out at 25 per cent. per annum, the author suggesting that where no date is named for payment the loan was for one year.

B. Obligation or mandate of the creditor on the debtor at short maturity, with penal clause.

"Two talents of copper (credit) of Mannu-ki-Arbail on Samasakheisallim. The latter will pay in the month Ab (*i.e.*, on the last day). In case of non-payment the debt will be increased by a third. The 11 Sivan, éponym of Banbâ (676 B.C.)."

(Names of witnesses follow.)

C. Obligation secured by a credit on a third person from whom there will be recourse in case of non-payment.

"Seven shekels of silver (credit) of Mardukabalussur, son of Mitia, on Mardukabalussur, son of Segua, who (has a credit) on Rimut-Nabu, son of Mitia, son of Ilanitabui. Mardukabalussur (ii.) will pay 17 shekels of silver per month, plus three days work as interest. In the case of non-payment by him, the credit shall be effective on Nabuakhidin and Rimut-Nabu, who must jointly and severally pay. Orchoé, 22 Adar, 2nd year of Cyrus, King of Babylon."

(Names of witnesses follow.)

same author. *Cf.* "La Vie Privée des Anciens," by Réné Ménard, vol. vi., p. 205.

(*g*) Karkhemish, which was the most important emporium for trade along the great northern caravan route, and the last surviving capital of the Hittite Kingdom, was captured by Sargon II., King of Assyria, at the end of the 8th century B.C., and at the time of these bills Babylon was a subject kingdom. Trade from the Persian Gulf would also pass through Karkhemish, where two caravan routes crossed each other.

D. Obligation delegating to a third person the right to recover the credit.

> "Three minæ of silver (credit) of Ibbanapal, son of Pallai, son of Zupe-Bel, on Samasakhiddin, son of Mitia. He will pay one mina of silver in the month of tasrit, two minæ of silver in the month of Kisiliv. He will pay the interest, amounting to 40 shekels of silver, in the month of sivan. Mitiya, son of Beltab-nirar, will recover the three minæ. Orchoé, 22 Adar, the year of the accession of Nabu-nâhid, King of Babylon."

(The names of the witnesses follow.)

E. The following is a fully developed bill of exchange, drawn from one place on another.

> "Four minæ fifteen shekels of silver (credit) of Ardu-Nana, son of Yakin, on Mardukabalussur, son of Mardukbalatirib in the town of Orchoé, Mardukbalatirib will pay in the month of tebet four minæ fifteen shekels of silver to Belabaliddin, son of Sinnaïd, Our the fourteenth Arakhsamna, Second year of Nabu-nâhid, King of Babylon."

(The names of the witnesses follow.)

These clay documents were evidently issued before the use of coins, which were first invented, it would appear, in Lydia, and at about the same time in Greece, but were not used by the Phœnicians until the time of the Median wars (*h*).

We now come to a familiar story which introduces the mention of a document the form of which we do not know, but which either as an assignment or an order to pay to bearer was sufficient to obtain the delivery of about £2,500. Not many years before the collapse of Assyria in 612 B.C.

(*h*) *Ménard*, p. 193. For some Babylonian letters of credit or bills of exchange on clay tablets dating from 677-179 B.C., see "Les Inscriptions Commerciales en Caractères Cunéiformes," by Jules Oppert, 1866. See also p. 267, etc., of "Documents Juridiques," by J. Oppert and L. Ménant.

before the attacks of the Medes—which must have restored Jonah's complacency if he lived to witness the event—Tobit of Galilee, a rich captive living in Nineve, a man who feared God and was zealous of good works, confided ten talents of silver to Gabael, at Raghes, an important city of Media. "And Tobit remembered the money which he had committed to Gebael of Raghes of Media, and he said within himself—I have wished for death: wherefore do I not call for Tobias my son, that I may signify to him of the money before I die? . . . and he gave him the handwriting." But while on the road to Raghes, Tobias tarried at Ecbatana at the house of Raguel, and, marrying his kinswoman Sara—the lady of the seven dead husbands—was forced by his father-in-law to tarry the accustomed fourteen days in that town. "Then Tobias called for Raphael and said unto him—Brother Azarias, take with thee a servant and two camels and go to Raghes of Media to Gabael, and bring me the money, and bring him to the wedding. . . . So Raphael went out and lodged with Gabael and gave him the handwriting: who brought forth bags which were sealed up and gave them to him. And early in the morning they went forth together and came to the wedding: and Tobias blessed his wife." (*hh*).

There now follows a great gap in our knowledge, only partly filled by references to Greece and Rome; and then we come to another gap, partially filled by reference to the Arabs. During this last interval the mercantile document of credit in the Empire and its descendant States appears to have gone out of use and this brings us to the period of the Crusades and the Arab influence, which we have already mentioned.

Capmany (*i*) quotes two instances of exchange, both apparently in the twelfth century, the first being the sub-

(*hh*) Cf. 2 Kings v. 15: Naaman said to the man of God, "I pray thee, take a blessing of thy servant," *i.e.*, a present.

(*i*) Capmany, "Memorias Historicas sobre la Marina y Commercio de Barcelona," vol. i., pp. 126, 297.

ject of a lawsuit in England by Jaime Velasca, a Barcelona money-changer at Dordrecht, in respect of a bill of exchange for £25 sterling drawn by him on two merchants of Lucca residing at Boston, the bill being payable either in London or Lincoln. The second case occurred in 1181, when Isaac of Rochester, Isaac of Russia, and Isaac of Beverley were accused of having "exchanged" at Southampton, evidently without licence.

Again, Bienvenido Oliver says that when the Customs of Tortosa were promulgated (? 1279), exchangers were already an important institution in the public street, with their benches of rather larger size than those of ordinary merchants, and that they were in the habit of drawing and accepting bills (*k*).

In his short description of the fairs of Champagne, we read in Bent's "Genoa" (p. 105): "These fairs would begin with the sale of cloth, perhaps for seventeen days; then the cloth merchants would settle their accounts prior to the silk merchants entering on their bargains. In the middle of it all the great cry *Ara!* was raised, as a signal for the money-changers to take their seats, and for four weeks they sat for the benefit of the various nationalities who wished to realise their gains in their native coin. After the conclusion of the fair, a busy time of fifteen days was set apart for those who had not yet settled their accounts and to rectify disputes, which was extended in favour of the representatives of more distant people who wished to go home and return before finally completing their books. Thus we find that the Genoese bursar at these fairs had always a month allowed him before settling his account."

Huvelin says, at p. 540 (*kk*), that in the later Middle Ages local coins, and especially those of Provins, were used at

(*k*) Historia del Derecho en Cataluña, Mallorca y Valencia, vol ii., p. 228.

(*kk*) Foires et marchés.

the Champagne fairs, and thence their use spread as far as England and Flanders, just as the use of some weights and measures, Troyes, Avoir de Pois, and the like, became part of our English system; that, though the use of any but specified moneys was sometimes forbidden on certain markets, it was the rule to admit all coinages at the fairs, that money-changers in time became officials of the fairs and had to pass all good moneys tendered by the purchasers.

The imperious need of the services of money-changers arose not only from the attendance of so many different nationalities but from the fact that each succeeding monarch immortalised himself by having new coinage struck, impressed with his effigy—a harmless and usual thing enough—but of size, alloy and value often differing from all coins till then in use.

Not only were bills used for the settlement of differences at the close of fairs, but they also formed a convenient method of avoiding the ecclesiastical prohibition of claiming interest for the use of money lent, were safer and less bulky than hard money, and would frequently be expressed in money differing from that current where they were drawn. All disputes were subject to the jurisdiction of the fair judges (*l*).

When bills were drawn payable at a fair, and no day was named and when not drawn on a banker, eight days were allowed after the day of acceptance, unless local regulations otherwise provided, as was the case at Lyons, where three days were allowed after the last day of the fair (*m*).

Bills drawn at usance (now obsolete) implied one month from date in France, England, Holland, and Germany (*n*).

The same author attributes re-exchange to the invention

(*l*) See several royal decrees cited in "Toubeau," book i., tit. 17.

(*m*) Toubeau, vol. ii., p. 213.

(*n*) *Ib.* p. 214. Both this author and Huvelin write extensively on the subject generally.

of the Ghibellines when, driven from Florence by the Guelphs, they took refuge in Amsterdam (*o*).

After the great importation of unearned gold into Spain which followed the conquest of America, the fairs at Medina del Campo became the great and only centre for the settlement of credits in that country, orders on bankers having become the general substitute for coin. About the same time the fair of Besançon was founded, in 1537, by Charles V., not for dealing in goods, but for the discharging and making of credits under the leadership of the Genoese bankers; though the troubles in France caused its frequent removal, always towards the south, until at the beginning of the eighteenth century it rested at St. Marguerite, a small port near Genoa (*p*).

Canale in his "Nuova Istoria della Republica di Genova" (*q*) gives instances of promises to pay at fairs which are instructive and interesting. Thus, on July 22, 1227, Otto Balba of Soziglia confesses to having received from William of Osa, banker, and from Aroldo di Lantelino of Piacenza, by way of exchange, 55 livres 10 sols, for which he promises to pay 42 livres good Tournois money of Provins at the next fair of St. John at Troyes within the eight days following the opening of the said fair; in default whereof he will pay at Genoa 18 deniers of Genoese money for every 12 unpaid at maturity. Again, on September 12, 1232, William of Pagano acknowledges to have received from Martin Bancheri, son of Obert, 520 livres, employed in buying half a cargo of dye-wood to be delivered at the fair of S. Ayoul in France. William promises to pay at this fair in August, 1235, to Ido and Giacomo Lercari, 1,000 livres of Provins for the 1,437 livres which he had received at Genoa. By this document 1,200 livres Tournois were to

(*o*) Toubeau, vol. ii., p. 183.
(*p*) Huvelin, p. 410, etc.
(*q*) Cited by J. Finot in his "Relations Commerciales entre la Flandre et la République de Gênes," p. 14.

be exchanged for the same number of livres of Provins at the next fair of Provins. Lastly, on October 31, 1252, Rofredo Breminzano of Siena declares that he has received of Géraud de Oltremare, 1,416 livres 14 sols 4 deniers of Genoa, for which he undertakes to pay by way of exchange 1,000 livres of good money of Provins at the next fair of Troyes, and in the event of non-payment to pay at Genoa 19 deniers (Genoese) for each sol unpaid at maturity.

On October 12, 1465, the "municipal" English Office at Genoa sent to their correspondents at Bruges *litteras fidei* for £500 sterling to be paid to the English as a guaranty of a proposed treaty, which was, in fact, signed on January 3, 1466 (*r*).

What appear to be genuine bills of exchange are mentioned as contained in Desimoni e Belgrano (documents 125, 126): "On July 31, 1467, the Protectors of the Company of St. George at Genoa draw a bill for 10,000 florins on Alessandro Negrone, Genoese merchant at Bruges, the florin being taken as 13½ gros; and another bill for 600 florins on Lazaro Lomellino, merchant at Bruges" (*ib.*, p. 186). An interesting document is a draft of November 20, 1310, by Robert, Count of Flanders, under his seal, ordering his drawee at Bruges to pay two merchants of Genoa, or their representative presenting the bill, the sum of 550 Paris livres in two instalments. The original parchment is in the Archives du Nord (*s*).

The first mention of bills of exchange in England seems to be that contained in the statute of 1379, 3 Rich. 3. c. 3, whereby it was forbidden to export "gold, silver, nor other treasure nor commodity out of the said realm by letter of exchange, etc.," without the royal licence.

But letters of credit were common in England many years before and were issued by our kings for the purpose of making payments or raising money abroad; thus, Richard I.

(*r*) Finot, p. 30. (*s*) *Ib.* p. 297.

obtained an advance of 2,125 marks from the company of merchants of Piacenza on a letter apparently addressed to all merchants, and others were issued by King John. Payment was to be made on presentation of the letter with the acknowledgment of the receipt of the sum claimed (Rymer's "Foedera," V. i., p. 115).

The first reported case on a bill of exchange is *Fuller* v. *Thorne*, 1533 ("Select Pleas in the Court of Admiralty," p. 41.)

Bearer Documents.

For the early history of obligatory writings payable to bearer, F. W. Maitland, in Vol. II. of "Select Pleas, etc.," refers to papers by Dr. Brunner in "Zeitschrift für das Gesammte Handelsrecht," 1877, and on page 152 of the book reproduces the record of a case at the fair of St. Ives, apparently about the year 1275, where "Brun de S. Michel of Bordeaux complains of Walter Troner and Reginald Wreningham of Norwich, the peers, parceners and commoners of one Robert Dunwich of Norwich and John his son, for that the said Walter and Reginald along with the said Robert and John by force and unjustly detain and deforce from him £8 of silver out of a sum of £8 10s., which they were bound to pay to the said Brun *or any on his behalf*, bearing a certain obligatory writing made between them on Midsummer Day, A.D. 1274, for wines which the said Brun had sold to the said Robert and John in the fair at Boston on the Friday before the Feast of S. James, A.D. 1273, etc."

Paper Money.

The use of paper money appears to have arisen in China, where it was in universal circulation in the Middle Ages. Marco Polo speaks of its compulsory use at Peking (*t*).

(*t*) "Relations Politiques et Commerciales," J. T. Reinaud, p. 207.

Banks.

The times which chiefly attract our attention, namely, the later Middle Ages, so much concerned in the development of the commerce which radiated from the Mediterranean, naturally gave rise to institutions of credit which were required to meet the demands of increased trade and intercommunication. The leading commercial city being Venice, it is not surprising that the birth of the first banks occurred there under the ægis of the State. The first was founded in 1156, and was afterwards divided into two more banks, the three being the Monte Vecchio, the Monte Nuovo, and the Monte Novissimo. But the leading banking centre was ultimately Florence, with Pisa coming second. The first Spanish bank was the Taula de Cambi (Catalan for "exchange-table"), which was founded in Barcelona in 1401.

This Spanish title may well remind us that banks were an evolution from the business of foreign exchange. Wealth in the precious metals is of no constant benefit unless it is employed, and hence came the practice of lending surplus moneys to the exchangers at interest (*u*).

The exchangers being in possession of lent capital as well as their own, it was possible for a creditable citizen to borrow at interest, whether for employment on the spot or for repayment at a future fair where the caravan should next do business. We know that trading in bills of exchange developed in quite early times, written transfer being generally required as proof of good faith. So here we have the

(*u*) In the Parable of the Talents we read that "the servant who had got the £1,200 at once went and traded with them, making another £1,200," and so the servant with £500; but to the servant who got £250, having only kept them safe from robbery, his master said on his return, "You rascal, you idle servant! You knew, did you, that I reap where I have never sowed, and gather where I have never winnowed! Well then, you should have handed my money to the bankers and I would have got my capital with interest when I came back." Matthew, xxv., 26, tr. by Dr. Moffatt.

essentials of all banking businesses, to which would soon be added the use of some instrument like the cheque or order to pay, of which we may find instances, at least in Roman times, in the Egyptian papyri (*x*).

In European trade centres we know that the first Greek banker was Philostephanos of Corinth (who received a deposit of about £16,000 from Themistocles), that the Greek bankers had a document not unlike a cheque, and had letters of credit and even a form of indorsement. The Greeks instituted the Roman banks, and these may have drawn bills on their foreign correspondents, for Cicero (*obiit* 43 B.C.) wrote inquiring whether his son, who was to go to Athens, should take with him some sort of documentary credit or cash (*y*).

But much earlier there existed the great firm of Egibi, described in the book on Media by Miss Ragozin, where we are told that some thousands of tablets were discovered at Babylon about 1874 and later, and were brought to the British Museum by George Smith and H. Rassam, and found to be documents recording all sorts of commercial and pecuniary transactions bearing the names of the contracting parties and witnesses, but always carrying the name of some son, grandson or descendant of Egibi, who may have been Jacob, a Jew of the captivity of Samaria, and who, at any rate, was the founder of a firm possessed of great wealth and influence which for many centuries transacted business

(*x*) "The Fayûm Towns and their Papyri," by Grenfell, Hunt and Hogarth, p. 241, and elsewhere.

(*y*) "Modern Currency," by J. F. Cater, pp. 38, 401; see also "Les Banques dans l'Antiquité," by G. Cruchon, pp. 19, 31, and "Public Economy of the Athenians," by Aug. Boeckh, tr. by A. Lamb, p. 175. For some account of Poseion and his great bank of the time of Demosthenes, see "Social Life in Greece," by J. P. Mahaffy, and other authorities; and "Demosthenes pro Phormion, etc.," and for Greek trade generally in classical times, when they successfully competed with the Phœnicians in the Levant and Eastern Mediterranean and the Black Sea, refer to the "Manual of Greek Antiquities," by P. Gardner and J. B. Jevons, 2nd ed., vol. i., p. 386.

and money affairs, besides collecting taxes from whole provinces as farmers from the Government (*z*). This was twenty centuries before the date usually assigned to the invention of banking operations in the Middle Ages.

Interest or Usury.

"Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of any thing that is lent upon usury. Unto a stranger thou mayest lend upon usury; but unto thy brother thou shalt not lend upon usury." So ran the Mosaic law as it appears in Deuteronomy xxiii (*a*).; and the like distinction between Hebrews and foreigners was made in the year of release [of debts, etc.]. Those were not commercial times, and a "brother" would only borrow when, having sold all he had to sell, he had no other resource for meeting the support of his family or his taxes. It was a desperate situation, to be inevitably followed by some form of slavery if the improbable interest were not forthcoming. We know something of the horrors of cruel indebtedness both among the Athenians, until the remedies of Solon, and among the Romans till the less thorough amendments of Julius Caesar. The canon law adopted the Mosaic principle without its distinction and the Muhammadan law followed the Jewish, so that at the time of the commercial renaissance of the Middle Ages the nominal prohibition of lending on interest was universal (*b*), according as we are reminded by Walter Ross in his eighteenth-century lectures on the commercial law of Scotland—"Dare pecuniam mutuo non ideo est peccatum, quia est prohi-

(*z*) These tablets are now considered by many to be only of a juridical character, see "Modern Currency," by J. J. Cater, 1899, p. 20; the Babylonian dated tablets, by W. St. Chad Boscawen, vol. vi., p. iii., of "The Transactions of the Society of Biblical Archæology, 1878."

(*a*) *Cf.* Ex. xxii., 25, Lev. xxv., 35-37.

(*b*) Except that by the Fuero Juzgo, or law of the Visi goths, interest was allowed on purchase money unpaid when due. Book v., tit. iv. Law. 5.

bitum; sed potius ideo est prohibitum, quia est secundum se peccatum; est enim contra justiciam naturalem" (*c*). But it proved inconvenient to the Church as well as to merchants, this inhibition of interest; so the ecclesiastical lawyers, never at a loss in a good cause, found abundant ways of evading the plain injunctions of the Church; and hence, by means of exchange, re-exchange, pledge, mortgage, sale and resale, annuities, and so on, money was profitably used, apart from buying and selling and charges for services rendered, and the rule against interest remained partially effective only in the Muhammadan world (*d*).

But the chief method by which the rule was emasculated was by the distinction, allowed by the Church, between interest or usury and damages; a debtor in default, not having agreed to pay interest, was sued in tort as wrongfully detaining the plaintiff's money and so liable for the sum due, plus an uncertain sum to compensate the damages caused by that default: as it is said in the Digest xxii, title 17, "Usurae non propter lucrum petentium sed propter moram solventium, infliguntur." So the borrower was condemned to pay both the *damnum emergens* and the *lucrum cessans—dommages et intérêts, i.e.*, the material damage plus loss of profit, an amplification of the maxim of Paul "Quantum mea interfuit, id est, quantum mihi abest, quantumque lucrari potui" (D. xlvi. 8. 13). And this is the law both in France and Spain at the present day, except that in the latter country the *perjuicios*, as they are called, are confined to the legal interest in the absence of special agreement.

(*c*) St. Thomas and the Canon law.

(*d*) That the prohibition of interest was disregarded among the many bodies of merchants is evidenced by a law of 29 March, 1357, "contra cambia et contractus usuarios, ut judices ea reducant ad rectas exbursatas quantitates et veras," at p. 207 of "Index omnium materiarum que in Venetiarum statutis continentur, 1548." This is something like what was found necessary in England after the repeal of the usury laws and now to be seen in the Money-lenders Act of 1900.

It is often said that in England interest is payable on a dishonoured bill of exchange, but interest is only interest when it is the subject of agreement; otherwise it is compensation or part of it; and so it is treated in the Bills of Exchange Act, 1882, c. 61, s. 57. In France and Spain statutory interest is given as damages on dishonoured bills.

In England interest is not generally demandable on trade debts in arrear, in the absence of usage, such as that of bankers, or unless the terms of 3 & 4 Will. 4. c. 42, s. 28, apply, giving the right to interest on principal sums due at a certain date under a written instrument, or when a written demand for payment has been made intimating that interest will be charged from the demand until payment (*e*).

Bankruptcy.

The jurisdiction of the fair would not have been complete in the absence of some custom controlling the event of the failure of a merchant to meet his instant liabilities. In the absence of misfortune a trader who dishonoured his word was supposed to have acted with fraud and met with little mercy.

We have seen that the itinerant money-changers were allotted their special place in the fair streets and there they set up their bench or bank, table or counter, rather larger in size than would be allowed to other merchants, though money-changing was not incompatible with the conduct of other trades. For local rules applying to them reference may be made to such *fueros* as the Costums of Tortosa, one of the earliest, if not the original, of the Spanish *costums*, authorised by the King of Aragon early in the thirteenth century. J. Escriche, in his "Diccionario de Legislacion, says, under *bancarota*: "The word *bancarota* as well as its odious significance take their origin from the ancient and

(*e*) A full but succinct account of the vicissitudes of "interest" will be found in Escriche's "Diccionario de Legislacion," under the title *interes*.

famous fair of Medina del Campo, a town situate in the heart of Castilla, and formerly one of the principal places of commerce in Europe. The Genoese, who were those who there carried on the business of bills of exchange and money-changing, were placed in the principal market with their tables or counters and a bench of wood to sit on; and when any one of them intentionally betrayed his good faith, the consuls or magistrates of the fair imposed on him, among other penalties, the punishment of solemnly breaking the said bench in the presence of the immense gathering, declaring him at the same time unworthy of mixing with honourable men, and excluding him for ever from the fair of Medina. This breaking of the bench occasioned the word 'bankrupt,' which soon became generalised in Europe to designate the condition of culpable or fraudulent insolvency''; while the word used in Spain for a failure which was occasioned by misfortune is *quiebra*. It is suggested, however, that this practice of breaking the bench was introduced by the Genoese, and not exported by them from Spain to other parts.

It is clear that in all nations which observe the distinction, the bankruptcy of *traders* is a matter for the commercial courts. The failures which occurred at fairs were matters for summary action by the consuls whose duty it was to seize the available assets of the debtor, to sell them and to distribute the proceeds among the fair creditors (*f*).

In our own country it was not until the year 1861 (*g*) that any insolvent debtor other than a trader could be made bankrupt. Such were consigned to the Marshalsea and so prevented from recovering their solvency and paying their debts. It is curious to observe that the most recent trend of our bankruptcy law has been to treat a bankrupt as suspected of fraud (*h*).

(*f*) Toubeau, vol. ii., tit. xii.
(*g*) By 24 & 25 Vict. c. 134.
(*h*) Bankruptcy Act, 1914.

CHAPTER V.

Insurance.

"Ships are but boards, sailors but men: there be land-rats, and water-rats, water-thieves and land-thieves: I mean, pirates: and then, there is the peril of waters, winds and rocks."—SHYLOCK, *The Merchant of Venice.*

"Cum tales contractus inter mercatores soleant frequentari, robur recipiunt, et debent observari, et valere hujusmodi conventionem."—B. STRACCHA, *De Assecurationibus*, Intro., p. 37.

It has been the custom of writers on marine insurance to assert with general unanimity that insurances are of quite recent growth; but some have called to mind that mention is made of marine insurance in a speech by Demosthenes, and that Suetonius states that the Emperor Claudius insured the goods of the merchants at Rome (*a*). However that may be, it seems little short of the incredible that so obvious and simple a method of gambling on the one hand and making sure on the other could have escaped the inventive ingenuity of the traders of older times. It is hardly to our purpose to give the history of modern insurance, which was a late accretion to the law merchant, or, rather, to commercial law. Is it not possible that the practice of insurance existed and yet left but little trace?

In the "Jewish Encyclopaedia" we read that a *baraita* (*b*), probably of the second century, contains the principles of marine insurance: "And shipowners have the right to contract that whosesoever vessel is lost, they will get him another; but if it is lost through his fault, they do not

(*a*) "Pardessus" (i., p. 72), shows that this was not a true insurance.
(*b*) Teaching of the *bara* or outer schools, *ib.*

replace it; and if he has lost his vessel whilst deviating from the proper course, they do not replace it." This would appear to refer to mutual insurance as between ships forming part of a trading fleet, and being between merchants would be settled between themselves or in the summary courts of the merchants, the main object of contention being a mere question of fact.

The above *baraita* is some slight confirmation of the often-expressed opinion that the Jews practised insurance on shipping from early times.

But the first instance of what may be termed insurance, though the transaction was in form a loan, is contained in the report of the speech of Demosthenes against Lacritos (*post*, p. 74), where he gives the text of a contract of loan, which operated as an insurance of shipped goods, and which probably followed the common form. It will be noticed that the loan partook of the character of an insurance in that it was not repayable in the event of total loss, and was only repayable in part in the event of certain partial losses. It is said that this insurance loan is still common in the East.

Mr. Ashburner says that "Although the terms in which the loan was expressed remained substantially the same from the age of Demosthenes till the thirteenth century, there are differences in the wording of the documents which do not necessarily imply corresponding differences in the legal effect of the transaction" (*c*).

It is not inappropriate to remark that when Alexander the Great was at Babylon, a Macedonian grandee, Artimenes the Rhodian, undertook for an annual payment of eight drachmas for every slave in the army, if the slave ran away, to return his price to his master as the proprietor of the slave himself had estimated it (*d*).

(*c*) "The Rhodian Sea Law," p. 209.

(*d*) "Public Economy of the Athenians," by Aug. Boeckh, tr. by A. Lamb, p. 101.

It will be obvious to all that the rules of general average which appear as early as the most ancient of maritime codes really form a system of mutual insurance, a system eminently necessary when perils of war, pirates and storm were more serious than they are at the present time, and when the shipowner ventured his vessel, otherwise uninsured, for the benefit not only of his own goods, since he was often also a merchant, but for the behoof of all the shippers; who, in those distant times, had to be consulted as to jettison and many other matters now left to the discretion of the master. The *baraita*, mentioned above, is probably concerned with what may almost be assumed to have been customary, namely, that there should be a liability to general average between all ships sailing in company or with convoy (*dd*).

How old was the custom of assuming mutual liability we may never know: but it is not rash to guess that the Laws of Rhodes were but the collection of old customs, which may have been formed in the earlier times when the Phoenicians were the carriers general for the Mediterranean and beyond, and adopted by the Greeks when they also developed a great sea-trade not only with their own numerous colonies but with many foreign countries as well. Thus, in the reign of Psammatic I., a king who had first employed alien mercenaries, "the Greeks were invited to make settlements in the (Egyptian) delta, and Naucratis, favourably situated on the Canopic branch of the Nile, was specially assigned to them as a residence. Most of the more enterprising among the commercial States of the time took advantage of the opening, and Miletus, Phocaea, Rhodes, Samos, Chios, Mityene, Halicarnassus and Aegina established factories at the locality specified, built temples there to Greek gods, and sent out a body of colonists. A considerable trade grew up between Egypt and Greece. . . . The trade thus established was carried on mainly, if not

(*dd*) See Pardessus, vol. ii., intro., p. 122.

wholly, in Greek bottoms, the Egyptians having a distaste for the sea, and regarding commerce with no great favour. . . . Naval architecture made great strides, first by the inventiveness of the Phoenicians, who introduced the bireme, and then by the skill of the Greeks, who, improving on the hint furnished them, constructed the trireme, etc." (*e*).

The cities of Phoenicia were sacked and burnt so many times that nothing perishable remains, and since they were familiar with the art of writing it is not probable that they left more than unsubstantial monuments of their maritime habits.

In the course of ages mutual insurance, which was generally practised in the Italian ports as between vessels *en conserve*, *i.e.*, forming a combined fleet, gave way to the present system of insuring as a separate business, experience and the growth of credit suggesting to "les hardis speculateurs," as Pardessus calls them, the business of insuring the safety of ventures in which they had no immediate interest. The earliest surviving code of maritime insurance is that known as the Ordenanza de los Seguros of Barcelona, issued from the Consulado in 1435 (*f*). From the contents it is clear that maritime insurance in the modern sense, *i.e.*, in consideration of a premium, had already been practised at that city for a considerable time. With no great interval this law was followed by similar laws of other maritime ports, such as the Ordonnances d'Amsterdam of 1598 and onwards and the Guidon de la Mer (*circa*, 1600, Rouen).

The first English reported case in insurance occurred in 1533, as reported in the Select Pleas of the Court of Admiralty, lxxiii.

In the same century a body of Spaniards was settled at

(*e*) "Egypt," by George Rawlinson.

(*f*) Capmany, "Memorias Historicas, etc.," vol. ii., p. 383. Pardessus, vol. ii., p. 493.

Bruges who issued policies of marine insurance, and in 1568 a code of insurance was drawn up by the Spanish consuls and traders there residing, with precedents of policies on ships, goods and lives (*g*).

Finot (*h*) mentions a few insurance cases, the first (p. 129) is cited from "Coutumes des Pays et Comté de Flandre" (G. van Severen ii. 104), a judgment of the aldermen of Bruges in a claim by Jean Boitin, of La Rochelle, on a written insurance made by three Genoese merchants on his goods in a vessel which was totally lost, the defence being that Boitin knew of the loss before the insurance was effected. On p. 155 he cites a judgment of the aldermen of Bruges in 1468 in a case brought by Juan Vasquez, a Spaniard, in respect of the insurance of a cargo of sugar, loaded at Madeira, and said to have been totally lost on the English coast. It is interesting to note that the precious commodity was chiefly imported from Madeira, where it became the main crop after the destructive seven years' fire which destroyed the forests shortly after the occupation by the Portuguese in 1419.

Beawes, in his "Lex Mercatoria" (*i*), says that insurance was introduced into England by the Lombards, who met at the Pawn House, where Lombard Street now is, and that to his day (1751) a clause was inserted in all policies: "This writing or policy of insurance shall be of as much force and effect as any writing heretofore made in Lombard Street."

Fire insurance seems not to have been practised in London until after the Great Fire in 1666, perhaps on account of the generally inflammable nature of the buildings, but it had been in use in many Continental cities.

The earliest known policy of life insurance was made in

(*g*) Emil van den Bussche in "La Flandre," vol. xi., p. 66.
(*h*) "Relations commerciales entre la Flandre et la République de Gênes au Moyen Age."
(*i*) 6th ed., vol. i., p. 429.

the Royal Exchange, London, on the 18th June, 1583, for £383 6s. 8d. for twelve months on the life of William Gibbons. Sixteen underwriters signed it, each severally for his own share, and the premium was 8 per cent. (*k*). But general life insurance seems to have been an extension of the rather older practice of insuring the lives of seafarers, mentioned in the Ordonnance of Philip II. for the Netherlands in 1570 (*l*).

The following short form of marine insurance is given in "Scaccia de Commerciis et Cambio," 1616, Cologne:

† Jesus, 1605 die.

Nomine D. Baptistae q. Oberti, toto infra scripto tempore durante super corpore, naulis corrediis, et apparatibus navis, nominatae S. Joseph, Capitanatae per Thomam Bordonum, vel per quemvis alterum, etc., deficiente una re, risicum restet super alia, vel aliis, spectante risico dicto Baptistae, vel aliis quibusvis, incipiendo risicum die, et hora, qua dicta navis recesserit ex praesenti portu Genuae, & duret per meses tres, tunc proxime venturos inclusive, prima, & ultima die comprehensis, & possit patronus, & quisvis cum dicta navi, & aliis praedictis fuerit, toto dicto tempore durante, ubique tangere, ire, stare, & navigare ubique & quocunque, in locis, et ad loca tam infidelium, quam Christianorum & a dextris, & a sinistris amecedere, & retrocedere, tam intra limites, quam extra onerare, exonerare, & reonerare semel, & pluries portus quoscunque, & schalas facere ac unum, & plura navigia facere ad quasvis mundi partes, toto dicto tempore durante, viagio mutato, vel non mutato, prout dicto patrono videbitur, & placuerit: nec per aliquam onerationem, exonerationem, & reonerationem, ubivis, & per quemvis faciendam, de praesenti risico aliquid minuatur; imosit, & restet semper firmum, & integrum super restantibus: de risico, valore, spectatione, qualitate, & quantitate praedictorum credatur

(*k*) Enc. Brit., l. c. (*l*) Pardessus, iv., 103.

simplici verbo cum juramento de D. Baptistae, vel personae pro eo absque aliqua alia fide, seu probatione facienda, & demum in caeteris cum omnibus & singulis suis clausulis, cautelis, solemnitatibus, & renunciationibus, quae apponi solent in similibus apodixiis securitatum ad beneficium illorum, qui se assecurari faciunt, quae habeantur hic pro expressis de verbo ad verbum ad exigendum casum sinistrum (quod absit), praedictum D. Baptistam, vel personam pro eo legitimam, renuntiantes, & cedantes, &c. promittentes, &c. Sub, &c. jurantes, &c. Jesus, die 16 Septembr. 1615. notata per me Stephanum Canevarium Gub. Cabellae securitatum, & per me Joan. Andream de Andrea notarium, & d. Cabellae scribum.

Jo. N. assicuro scudi quattrocento, & son pagato, Dio la salvi.

Jo. N. assicuro scudi ducento, & son pagato, Dio la salvi, &c.

(Then follows a formula of *life assurance* of 30 Nov. 1609.)

There is a longer form of marine insurance in B. Straccha, "De Assecurationibus," Intro. 67, dated 1567.

On the subject of modern law of insurance generally, consult Marquardus (1662), p. 330.

CHAPTER VI.

Shipping and Shipping Documents (*a*).

In the earliest known collection of laws, namely, the Code of Khammurabi (*b*), as translated by Mr. Johns, and here slightly altered, we read—

236. If a man has given his ship to a boatman on hire, and the boatman has been careless, has grounded the ship, or has caused it to be lost, the boatman shall render ship for ship to the owner.

237. If a man has hired a boatman and ship, and has loaded her with corn, wool, oil, dates, or whatever it be as freight, and that boatman has been careless and grounded the ship, or has caused what is in her to be lost, the boatman shall render back the ship which has grounded and whatever in her he has caused to be lost.

238. If a boatman has grounded the ship of a man and has refloated her, he shall give money to half her price.

240. If a ship that is going forward has struck a ship at anchor and has sunk her, the owner of the ship that has been sunk shall recount before God whatever he has lost in his ship, and he of the ship going forward which sunk the ship at anchor shall render to him his ship and whatever of his was lost.

These articles form the most ancient statement of shipping law that we have. Whether they were arrived at independently of the practices of other countries, or con-

(*a*) In consequence of the multitude of books on shipping, it is not intended to deal at length with the subject.

(*b*) In those times the sea came 150 miles or so nearer Babylon than it now does. For a bibliography of the literature relating to the Code, see "The Laws of Babylonia and the Laws of the Hebrew Peoples," by Mr. Johns.

stituted part of the civilisation communicated from Egypt, as ardent Egyptologists would assert, we can only conjecture. We may at least accept the contention that Egypt preceded Mesopotamia in advancement by many centuries, and both by the west and the east sent her miners and seamen to search in Phoenicia and Syria for timber and for copper and other minerals in the countries bordering the Persian Gulf, and in the known world generally, not many centuries after she discovered the use of copper—say, over 3,000 years before Christ. The sea-laws of Egypt may have perished like the generality of records which would naturally be found in the damp soil of the Delta; but some trace of them may still be found in countries under the influence of her exploiting pioneers, whose remains have been discovered in widely separated localities (*c*).

Since the above was written, "The Minoans" by G. Glasgow has been published, in which he says, on p. 26, "Traces of commercial intercourse overseas can be found as far back as the Neolithic Age (*i.e.*, before 2500 B.C.). Among the deposits of stone implements in Crete are great quantities of obsidian knives, and the only source of obsidian in the Ægean was the island of Melos. . . . It is probable that the Minoan Empire had a navy as well as a merchant marine. Minos was commonly represented as "Ruler of the Waves," and the Greek historians, Herodotus and Thucydides, refer to him as a mythical character celebrated as the first possessor of a fleet. The extent of the Minoan Empire can be gauged by the survival of many trading stations and naval outposts on all the shores of the Ægean, from Sicily in the West to Gaza in the East, which bore the name of Minoa. Mr. Glasgow gives as the reason why Knossos was left unfortified, the fact that Crete had command of the sea. It may be that when the Cretan script

(*c*) Those who desire information on the spread of the wonderful early civilisation of Egypt are referred to such books as "The Ancient Egyptians," by Professor G. Elliot Smith, 1923.

has been mastered, we shall learn something of the most ancient mercantile customs in the world.

The latest account of the mutual influence and trade of Syria and Egypt from the earliest times is to be found at page 160 (ff) of "Social Life in Ancient Egypt," by Sir W. M. Flinders Petrie (1923). The Second Hyksos Dynasty, he says, were called "Lords of the North" and "Sea-Kings" on their scarabs.

What has become of all the old shipping documents? For it is not to be supposed that this great and constant trade was carried on without them from the time that writing became known and the clerk of the ship was carried on board. Almost nothing is known, and this is to be accounted for by the fact that they were of temporary use and also by the complete destruction perpetrated by such monsters of fiendish cruelty as Nebuchadnezzar and Alexander the Great, whose destructions of Tyre and other Phœnician cities are told to their lasting discredit. There can be little doubt that the latter destruction was carried out to exterminate the main trade rival of the Greeks.

The author has read a large number of translations of Eastern travels, particularly those made from the Arabic, and has met only one mention of a shipping document of the East, and that is to be found in "Chau Ju-Kua's," work on the Chinese and Arab trade of the twelfth and thirteenth centuries, written about 1250 A.D., edited by F. Hirth and W. W. Rockhill, where, at p. 48, it is said that on the arrival of the trading ship at Annam it is searched and a list made of the goods, all omitted from "the manifest" being confiscated.

It has generally been assumed that the Laws of Rhodes were the embodiment of Greek mercantile custom as practised about B.C. 200 (*d*), and this no doubt is true, but what is most improbable is that the Greeks first invented all these usages; ignoring the fact that the Phœnicians had

(*d*) *Ante*, p. 65.

carried on an immense sea trade for hundreds of years and could not have done so without customs similar to those found in the above laws (*e*).

For the earliest surviving charterparty I am indebted to Mr. Ashburner's book (*f*). It is of the year 236 A.D, and is summarised by him as follows (*g*):

1. X, captain of his own ship of the capacity of 250 *ἀρτάβαι* lets it to Y for the voyage therein stated. 2. The load is to fill the whole ship. 3. The agreed freight is 100 silver drachmai. X receives 40 on the spot and is to receive the remaining 60 on delivery of the cargo. 4. X will deliver the goods safe and uninjured by sea peril. 5. X has two days to load the goods. 6. He is to remain four days at the port of discharge. If kept longer, he is to receive 16 drachmai a day. 7. He is to provide sufficient sailors and the complete equipment of the ship.

The document is subscribed by X, who acknowledges the receipt of the forty drachmai.

In the book by Mas Latrie, entitled "Traités entre Chrétiens et Arabes au Moyen Age," are to be found several treaties of peace and commerce from 1181 to 1421, and many other documents, among which are some charter-parties, the earliest being a short one made at Genoa in 1251 of the *Grand Paradis*, for a voyage to Tunis, carrying goods and passengers "inter quos non sit aliqua femina" (p. 122). At p. 38 we find a charter-party made at Pisa in 1263 between certain merchants and shipowners of the city of Pisa for a voyage to Bougie. Its seventeen clauses are

(*e*) Mr. Ashburner says that in its present form this sea law must date between A.D. 600 and 800, and that a second edition was made either by or under the direction of the men who compiled the Basilica, so that it should fit into and complement LIII. of the latter. Part iii., which is the important and effective part, deals among other things with what may be called police offences in connection with shipping, jettison, deposit of valuables, maritime loans or partnerships, contribution, collisions and salvage. Intro., lxxv., cxli.

(*f*) "The Rhodian Sea Law," p. cclxxiv.

(*g*) Papyrus 948 in the British Museum.

given in a shortened form by Ashburner (p. clxxix). There is another charter-party of 1373 at p. 128 of the *Traités*.

The earliest form of what may have been the ancestor of the *respondentia* bond is given in the speech of Demosthenes against Lacritos (*h*) of the year B.C. 566: "Androcles of Spettos and Nausicrates of Carystos have lent to Artemo and Apollodoros, both of Phaselis, three thousand silver drachmai from Athens to Mende or Scione, and thence to Bosporos, or, if they please, on the left coast as far as the Borysthenes, and back to Athens, at the interest of 255 for the 1,000; but, in case they should sail out of Pontus to Hierum after the rising of Arcturos, at interest of 300 for 1000, on the security of three thousand casks of Mendean wine, which shall be conveyed from Mende or Scione in the twenty-oared vessel of which Hyblesios is the owner. They hypothecate these goods, not owing upon them any money to any other person, nor will they borrow anything further upon them. And they shall bring back to Athens in the same vessel all the goods which they shall purchase in Pontus for the return cargo. And, if the goods are brought safe to Athens, the borrowers shall pay to the lenders the money accruing due according to the agreement within twenty days after their arrival at Athens, without any abatement, *except for jettison, which the passengers have made by common resolution, or for payments made to enemies*, but no deduction shall be allowed in respect of any other loss; and they shall deliver the security entire to the lenders, to be under their absolute control until they have paid the sum due under the agreement. And, if they do not pay it in the stipulated time, it shall be lawful for the lenders to pledge or sell the security for such price as can be obtained; and, if there is any deficiency in the money which is due to the lenders, both or either of them to levy the amount by

(*h*) Bohn's Classical Library, "Demosthenes," vol. iv., p. 189. There are some valuable notes on shipping contracts by the translator, C. Rann Kennedy. See also the speech of Demosthenes against Dionysodoros.

execution against Artemo and Apollodoros, and against all their property, whether on land or sea, wheresoever it may be, in the same manner as if a judgment had been recovered against them and they had committed default in payment. And, if they do not enter Pontus, but stay ten days after the rising of the dog-star in the Hellespont, and discharge their cargo in some place where the Athenians have no right of reprisals, and thence return home to Athens, they shall pay the interest inserted in the previous year in the agreement (?). And, if the ship in which the goods are conveyed should meet with any irretrievable disaster, the security shall be saved, if possible, and whatever is recovered shall be the joint property of the creditors. And touching these matters nothing shall have greater effect than the agreement.

"Witnesses, Phormio of Piræos, Cophisodotos, a Boeotian, Heliodoros of Pithos."

A similar loan and its repayment may be seen in a document at p. 37 of Mas Latrie's "Traités entre Chrétiens et Arabes au Moyen Age," the former dated 22nd March, 1261, but not repaid until 21st April, 1272. "Puccius Bossus, filius domini Gerardi Rubei, de domo Lanfrancorum, coram me etc. recepit et habuit a Solaccio Vinario, quondam Lamberti, in societate maris in viadium in Bugeia, quod presentialiter est facturus, vel in aliud viadium, quod iret vel mictaret cum utilitate *hentice*, una vice et pluribus, libras xv denariorum Pisanorum minutorum, quas libras xv denariorum ei dare et reddere promisit infra xv dies proximos, postquam dictus Puccius Bossus Pisas reversus fuerit, seu major pars *hentice* Pisas reducta fuerit, cum omnibus partibus de quatuor partibus lucri quem dictus in eis reddere in denariis, sine omni briga, ad penam dupli obligando se, &c.

"Cassa est parabola suprascripti Solacii, asserentis sibi fuisse satisfactum in toto a suprascripto Puccio, &c." (*i*).

(*i*) Another such loan made at Genoa may be found at p. 106.

So it seems that the above rather ungrammatical document gave the lender twenty-five per cent profit on each voyage, and that it was contemplated that the principle of the *entega* (*k*) should be adopted, which was a species of partnership between the shipowner and the merchants, owners of the cargo, under which the captain, who was also probably the shipowner, was to trade the goods, the profits of the ship and cargo making one fund, and being divided in certain proportions between the ship, the crew, and the merchants.

The adoption of the sea-law of the East by the tribunals of the Western seas, and in particular by the Rooles of Oléron, according to Cleirac and other authorities, was deliberate, and these Rooles in their turn formed the bases of the Laws of Wisbuy in Götland and the laws of the Hanseatic League, all of which will be found in the same author's book, published in 1661.

(*k*) The word *entega* is derived from the Greek ἐηθήκη a late word meaning "capital." See W. Ashburner's "Rhodian Sea Law," p. ccxlvii.

CHAPTER VII.

Limited Partnerships.

As has been said, the most important contribution of the Muhammadan law to the European law merchant, if we except the bill of exchange, was the institution of the partnership *en commandite*, the ancestor of our limited partnership, and invented in part to avoid the prohibition of usury and in part to protect the dormant partner, who financed the caravan venture but who stayed at home and confided the expedition to the care of the acting partner, remaining himself liable only to the extent of the money he had invested. This form of partnership found its way into all the codes of Western Europe, and thence into the daughter States of the New World.

The partnership *en commandite* was invented, says Khalil ibn Ishak (*a*), in order to evade the prohibition of interest by the capitalist partner taking a large share of the profits, while the venture itself was confided to the *commanditaire*, who would travel far in the caravan to dispose of goods at distant markets and buy others for the return trade, just as Muhammad himself did under the orders of the wife he subsequently married. Later on, when the Italian republics came to appropriate a part of the commerce of the Orient, they had to adopt this law of the caravans and carry it into Europe.

Huvelin also (*b*) sees the germ of this partnership in the association of the merchant with his *commendatarius* or

(*a*) The Musulman Code, and see art. 969.
(*b*) " Foires et Marchés," p. 494.

missus, who trafficked in his employer-partner's goods in the absence of the latter.

But it is not to be supposed that the Saracens or other Arabs invented the *société en commandite*, for they invented but little. Doubtless they merely adopted it and passed it on, for even in the Code of Khammurabi, who died in 1916 B.C., we come across several clauses which can only be understood if we assume some partnership arrangement of a similar nature. The following articles of the Code are taken from the book of C. H. W. Johns (*c*) slightly altered:

100. The interests of the money, as much as he took, he shall write down, and when he has numbered his days he shall answer his merchant.

101. If he has gone where he has not seen prosperity, he shall make up and return the money he took, and the agent shall give to the merchant.

103. If while he goes on his journey the enemy has made him quit whatever he was carrying, the agent shall swear by the name of God and shall go free.

104. If the merchant has given to the agent corn, wool, oil, or any sort of goods, to traffic with, the agent shall write down the price and hand over to the merchant; the agent shall take a sealed memorandum (*d*) of the price, which he shall give to the merchant.

105. If an agent has forgotten and has not taken a sealed memorandum of the money he has given to the merchant,

(*c*) Another translation is to be found in "The First of the Empires, 1906," p. 231, by W. St. Chad Boscawen; and there are others. "The Babylonian and Assyrian Laws and Contracts," by C. H. W. Johns, is in substance a treatise on the same Code. At page 281 we find some explanation given of the business relationship of merchant and agent, which reveals in effect a sort of limited partnership, and this is further attested by the tablets found. It was specially prevalent in the caravan trade—"Caravan trade was always active. The name of Kharran (Harran of the Bible) in Mesopotamia is supposed to be derived from the numerous caravan routes that crossed there. The Tell el Amarna tablets tell us of the complaints made by the kings of Babylonia of the robbery of caravans in districts nominally under the control of Egypt."

(*d*) *I.e.*, receipt.

money that is not sealed for, he shall not put in his accounts.

106. If an agent has taken money from a merchant and his merchant has disputed with him, that merchant shall put the agent to account before God and witnesses concerning the money taken, and the agent shall give to the merchant threefold as much as he has taken.

107. If a merchant has wronged an agent and the agent has returned to his merchant whatever the merchant gave him, and the merchant has disputed with the agent as to what the agent gave him, that agent shall put the merchant to account before God and witnesses, and the merchant because he disputed the agent shall give to the agent sixfold whatever he has taken.

The first-known mention of the *société en commandite* in Europe occurs in a French Royal Ordonnance of 1315, which shows that the Italians had partnerships of this sort in France, the King declaring that no usurious operation could be seen therein (*e*).

Although in law a very different thing, the *société en commandite* hardly varied in essence from the relation of borrower and lender, when the latter participates both in gains and losses. This relation was the ancestor of the more formal insurance, as we have seen when treating of that subject; but also when a lender lends money to a trader by ship or caravan, with or without a charge on the merchandise, and takes his chance of the venture proving successful in earning him interest, he is so like a partner that in England we treat his claims as postponible to those of ordinary creditors by virtue of Bovill's Act of 1865.

(*e*) Ordonnance de 1315, Recueil du Louvre, i., p. 585. Pardessus, ii., cxxviii.

CHAPTER VIII.

The Consuls, Consulados, and Fair Courts.

The Consuls and Consulados.

As in so many other cases, it is impossible to fix with certainty the origin of the institution of consuls, but we may be content with noticing, very shortly, the practice of the ancient Greeks, of which Mr. Coleman Phillipson (*a*) says in part "Proxenia is in many respects the prototype of our modern consular system. In modern Greek the word πρόξενος is used as the equivalent of the word "consul." But it is not to be inferred that there is complete identity between the two institutions. The proxenoi, like our consuls, supplied information to the Government that appointed them, and also furnished advice and assistance to the citizens who were subjects of that Government whilst residing temporarily in the territory of the other country. The proxenos was invariably a citizen of that country which received the subjects of the state there represented . . . it did not necessarily confer on the proxenos any official status in his own country . . . the Government appointing him possessed no regular means of compelling him to perform the duties he undertook, or of punishing him for any breach of faith . . . the proxenoi fulfilled many duties of a political description."

Undoubtedly the more modern institution of consuls was of Italian growth, and at first these were apparently merely individuals whose duties were to attend the travelling

(*a*) "International Law and Custom of Ancient Greece and Rome," vol. i., p. 149.

merchants to the fairs, represent them generally in all matters connected with the fairs, with jurisdiction to settle all fair disputes which might arise between members of the same nationality. Of this more will be said later.

But besides these foreign-going officials there arose the institution of the Consulado within the country itself, which was a body of merchants to which was given autonomy in commercial matters. In 1279 Pedro III. of Aragon gave leave to the merchants of Barcelona to choose two judges, a franchise which subsequently became exercisable by the municipality—a change almost without a difference, seeing that mediæval municipalities were composed of merchants. These consuls, together with a committee of seafaring men —*junta de practicos*—drew up rules which formed the model for those adopted by Valencia in 1283. Subsequently, other consulados were formed in Mallorca, Perpignan, Burgos, Bilbao, Madrid, etc., those on the coast being generally known as consulados del mar. While the consuls alone exercised jurisdiction, administrative matters were in the hands of a committee of merchants (*b*).

But these city consulados did not originate in Spain, for Capmany in his "Libro del Consulado" states that the first was founded in Messina by Robert the First in Sicily in 1128, and that Genoa first chose consules del mar in 1250 (*c*).

In the preface to this "Libro del Consulado" (p. 51, etc.) Capmany points out that the laws of the Barcelona Consulado formed the model for all legislation of the later Middle Ages, and that although not printed until 1502, the laws themselves were compiled in the middle of the

(*b*) "Memorias Historicas sobre la Marina, etc., de Barcelona," book ii., ch. i. (vol. i., p. 152), Capmany. See *post*, p. 82.

(*c*) The author observes that no consuls were at this time permitted in England, nor did England appoint any until 1404, when Henry IV. granted to the English settled in the Hanseatic ports leave to nominate their own consuls.

thirteenth century, when already that city was sending consuls to various parts of the Mediterranean to act as judges between Catalans and as administrators of commerce. The laws themselves were founded on the Rhodian Laws and the Rolls of Oleron, which were published in Rouen in 1266. It is pretty certain, however, that the laws were those already observed by the Italian merchants and shipowners, who were masters of the Mediterranean commerce before that of Barcelona developed; and, indeed, there were in existence at Venice and Pisa and at other centres similar bodies of sea-law, all of which were abandoned in favour of the book of Barcelona, which by its excellence supplanted all rivals. If it had been an innovating compilation it would have had no such success. It prospered because it was recognised that it expressed better than any other collection the general practice of the sea-trading nations.

Fernandez Duro (*e*) states that from the foundation of the Consulado at Burgos, the Spanish consulates in Flanders, France, England, Brittany, Florence, etc., were submitted to it (p. 246).

While the first Consulado in Spain—that of Barcelona—was in action in 1279, it was not embodied by Royal Decree until 1347, while Venice had one in 1280, Lyons in 1349, Florence in 1421, and there were consulates also in Tortosa, Tarragona, Gerona, and San Feliu de Guixoles (*f*).

Altamira refers shortly to the functions of the consulados (of which he says there were fourteen in Spain) as including the care of the ports, schools of pilotage and navigation, and summary decision of commercial disputes between merchants, while some extended their powers to matters of direct trade, to the fixing the tariffs, the establishment of lotteries, etc. They ultimately fell through lending large sums of money to the kings or the royal treasury.

In the "Recopilacion de las Leyes" we find the regula-

(*e*) "La Marina de Castilla."

(*f*) "Memorias Historicas, etc.," vol. iii., p. 277, by Capmany.

tions of the consulates of Burgos and Bilbao under a prior and four consuls, as at Barcelona. It is noticeable that the jurisdiction was not confined to the fairs but was general in commercial matters, that one of the duties was to charter ships so that Spanish wools should be transported in Spanish bottoms; and that the accounts of the foreign factors and consuls were to be sent each year to the fair of Medina del Campo, there to be examined by six merchants (*g*).

The Italian merchants trading in Champagne were organized in the thirteenth century in a corporation with a captain or rector, whose powers included the settlement of differences of the traders under their direction and the protection of their privileges granted by the lords of the fairs (*h*). The captain seems to have been the superior, having under him consuls representing the merchants of the different towns of Italy (*i*).

These consuls represented their nationals in legal proceedings in respect of *avaries*, otherwise *massaries*, which seem to have been fees charged for services rendered by the corporations of merchants, and assessed on goods carried on board ship (*ib.* p. 158). It is said (p. 150) that foreign goods carried on Biscayan, Catalunian, or Spanish ships owed *avaries* or *deniers de nation* to the Biscayan and Catalunian navies so far as the Straits of Gibraltar and after that to the Spanish navies. It is suggested that the charge was to cover premiums of insurance for partial loss for which the shipowners were liable, for the upkeep of the consular houses and for religious observances, for ship-repairs, pilotage and other services. The payment was due to the consuls, and in a proper case even by Biscayan and

(*g*) Book iii., tit. xiii. See Ordenanzas, etc., de Bilbao—really a local commercial code which includes the jurisdiction and composition of the Court.

(*h*) The damaged matrix of the corporation seal of the same date is mentioned as having been found in the Seine in 1862.

(*i*) "Relations Commerciales entre la Flandre et la République de Gênes au Moyen Age," J. Finot, p. 19.

Catalunian merchants as if they were foreigners (*ib.*, p. 169).

Citing Desimoni e Belgrano as his authority, Finot (p. 202) mentions the custom to elect the consul, or *massier*, by the Genoese merchants of Bruges every year, subject to confirmation by the Republic, and quotes letters patent of 1496 dealing with the collection of the *massarie*, or consular dues, which were payable in respect of the goods bought or sold by the Genoese merchants in Flanders, Brabant, Holland, and Zealand, authorising a fine of not more than 100 gold ducats on the recalcitrant, one-third of which was to be received by the Archduke of Austria, one-third by the corporation, and one-third by the "patricians" of Genoa. This was confirmed in 1501 by Charles the Bold. Fresh regulations were made on the removal of the Genoese merchants to Antwerp in the beginning of the sixteenth century (*ib.* p. 222).

According to Rymer's "Foedera" (xii., p. 261), the first official English consul of the merchants was appointed in 1485. Richard II. taking notice "that whereas certain merchants and others from England intend to frequent foreign parts, and chiefly Italy, with their ships and merchandise, and we being desirous to consult their peace and advantage as much as possible, and observing from the practice of other nations the necessity of their having a peculiar magistrate amongst them for the determining of all disputes, etc., between merchants and others, natives of England. Moreover, We understanding that the City of Pisa is a very proper place for the residence of our merchants; and being assured of the fidelity and probity of Laurentio Strozzi, a merchant of Florence, have and do, at the request of our merchants already frequenting Pisa, and such as are to resort thither, appoint him to be consul and President of all our merchants at Pisa and the parts adjacent, allowing him for his trouble herein the fourth part of one per cent. on all goods of Englishmen either imported

to or exported from thence." In the following year an Englishman, Christopher Spence, was appointed to the same consulship (*k*).

It will be evident that there arose in the Middle Ages several classes of consul. First, there was the itinerant consul or consuls who travelled with their compatriot traders, watched over their interests and judged their differences, as has already been said; and secondly, there was the permanent consulado or consulate, having similar but greater powers in the cities of their own country, where they and their prior formed the commercial court; thirdly, the consulate which was organised as a fixed institution in foreign trading cities with administrative and judicial jurisdiction over their nationals who were predominantly traders. This last class survives in certain states of imperfect civilisation. Fourthly, there were the more permanent courts in the towns visited by the itinerant merchants in which the word "consuls" was usually applied to the judges of the merchants, and which courts or, what was more usual, the municipal court of the Prior and consuls, subsequently developed into standing commercial courts, greatly extended in France by Charles IX., and the forerunners of the present commercial courts. The same judges were called *échevins* in Provence and Languedoc. Whether the personnel was elective, as was usual, or not, these courts being prerogative courts, their head, or *conservateur*, was at first appointed by the lord or municipality having the right to the court. In Spain and Toulouse and some other places the president was called Prior: while in other places the more ancient term of *prévôt* was continued (*l*).

It is a curious and noticeable fact that it was generally

(*k*) Anderson's "Origin of Commerce," vol. i., 301, 303.

(*l*) Toubeau, book i., pp. 23-31. He cites several French edicts conferring fair jurisdiction generally on the prior and consuls chosen by merchants, *e.g.*, of the Bourses of Toulouse and Rouen to decide in first instance all mercantile differences between merchants trading in the town (book i., tit. 17).

admitted in mediæval Europe that travellers took their law with them, and not only their personal law, as at present allowed; and so it was that little or no opposition, except in England, was raised to the foreign consuls judging their own nationals. The personal nature of mediæval law is well exemplified by the "Constitution of Lothair," imposed on Pope Eugenius II. in 824, under which each Roman citizen was allowed to choose whether he would "live" Roman, Frankish, or Lombard law (*m*).

It seems that in the countries which refused admission beyond the ports, it was the practice to carry consuls on board the visiting ships, though in the chief towns there might be resident consuls. This fact is mentioned by Count Mas Latrie (*n*) in his account of the trade of Marseilles with the Arabs of North Africa, the most important French merchants being the house of Manduel.

It may not be out of place to mention the heads of the treaties made with Genoa by Abou-Zakaria of Tunis in 1250 and 1272, as they provide for the appointment of consuls; and, though no doubt of usual form, bear a remarkably modern air: 1. Security of persons and liberty of transactions. 2. Jurisdiction and irresponsibility of consuls (*o*). 3. Property in the tradehouses, churches, and cemeteries. 4. Responsibility of individuals. 5. Proscription of the *droit d'aubaine*. 6. Reciprocal proscription of piracy. 7. Protection of shipwrecked persons and abolition of the right to wreckage. 8. Admission of treaty-protected foreigners under an allied flag (*p*). 9. Guarantees for transport,

(*m*) See "The Making of Western Europe," vol. i., p. 283, by C. R. L. Fletcher.

(*n*) "Relations et Commerce de l'Afrique Septentrionale en Mogreb avec les Nations Chrétiennes au Moyen Age."

(*o*) This because in Egypt and Turkey the consuls were treated as a species of hostage, responsible for the acts of their nationals (p. 107).

(*p*) In practice other foreigners do not seem to have been excluded. The clause so restricted was not in the later treaty of 1433. Note: The Florentines, for example, were bound to sail in the ships of Pisa. Is this

safety, sale and payment of merchandise. 10. Exportation of unsold goods free of duty. 11. Customary free ports to be observed. 12. Liberty of worship. 13. Fixation of customs dues. 14. Provisions against contraband. 15. Right of pre-emption of imported goods. 16. Requisition of ships for Government service to the extent of one-third on fair terms. 17. Reciprocity of treatment (*q*).

Fair Courts (*r*).

In England the summary fair court was known by the name of the Court of Pie Powder, a court with rights of summary execution, and a name of doubtful origin (*s*).

It is interesting to read what is said on the subject in Cruise's "Digest," tit. xxvii.

"88. When the king grants a fair or market, the grantee shall have, without any words to that purpose, a court of record, called the Court of Piepowders, as incident thereto; because it is for the advancement and expedition of justice, and for the support and maintenance of the fair or market. 89. Owners and governors of fairs or markets are to take care that everything be sold according to just weight and measure. For that and other purposes they may appoint a clerk of the fair or market, who is to mark and allow all such weights; and for his duty therein is entitled to just and reasonable fees. 90. A right of taking toll is usually annexed to a fair or market, though in many instances no toll is due; in which case it is called a free fair or market; for toll is not of right incident to a fair or market, and can

the origin of "Le pavillon couvre la marchandise"? By the Consulado del Mar, it is clear, the opposite rule governed (ch. 231). Pardessus, ii., p. 303.

(*q*) *Ib.* pp. 160, 181, 206. Other treaties are mentioned. See also "I Diplomi Arabi del Archivio Florentino," by Michele Amari, for treaties of 1087-1157, a book which contains also safe-conducts to Egypt, etc.

(*r*) See the previous chapter on Consuls.

(*s*) An Act of 17 Edw. IV. was passed in 1478 to remedy abuses.

only be claimed by special grant from the Crown, or by prescription; and if the toll be unreasonable the grant will be void. . . ." (Cruise in earlier sections speaks of unlawful markets and the appropriate remedies).

In the fourth volume of his "Institutes" Sir E. Coke says: "This Court is incident to every fair and market. . . . This is a court of record to be holden before the Steward of the Court and the jurisdiction thereof doth consist in four conclusions. i. The contract or cause of action must be in the same time of the same fair or market and not before or in a former. ii. It must be for some matter concerning the same fair or market done, complained on, heard and determined. iii. It must be within the precinct of that fair or market. iv. The plaintiff must take an oath according to the statute 17 Edw. IV. c. 2 (*i.e.*, that the contract or other deed contained in the declaration was done or committed within the time of the fair), but that concludeth not the defendant" (*t*).

Fair Franchises.

In old times one of the most important franchises enjoyed by the merchants travelling under the protection of the king was that of being exempt from the *droit d'aubaine,* so that their assets were safe for their families in case of death. Another franchise was the freedom from arrest, in respect of debts incurred outside or before the fair (*u*), a franchise

(*t*) The student who is in search of full information on the working of the English fair courts should consult volume 23 of the publications of the Selden Society, and particularly the Introduction by the late Professor Maitland.

(*u*) In the "Codex Justiniani," iv., 60, we find the following edict of Valentinianus and Valens: Qui exercendorum mercatuum aut nundinarum licentiam vel veterum indulto vel nostra auctoritate meruerunt, ita beneficio rescripti potiantur, ut nullum in mercatibus atque nundinis ex negotiatorum mercibus conveniant vel in venaliciis aut locorum temporali quæstu et commodo privata exactione sectentur, vel sub prætextu privati debiti aliquam ibidem concurrentibus molestiam possint inferre. And see Donker's Tract, de iure nundinarum (1752), p. 84.

which, in consequence of abuse, was subsequently modified. As to Spain, we may reproduce the terms of the Fuero de Aragon of 1592, De los Guiages de Ferias, granted by Philip II. "We enact and ordain of the free will of the Court, that those who come to fairs shall be governed by the same franchise during the same; so that they cannot be made prisoners for any civil debts or causes. This is to be understood within the place and territory where the said fair may be."

The law of the market overt is sometimes termed a franchise (*ante*, p. 37). Offences committed at the French fairs were punished with increased penalties until such time as the king's peace became general, *i.e.*, about the end of the fifteenth century.

Verbal contracts were executable within one year; but partly from want of scholarship and partly for the benefit of the lords' revenues and complete certainty most fair contracts were notarial and were sealed by the *garde des foires*. These, says Bourquelot, became obligatory in Champagne in 1326, and could be executed on the goods of the debtor within thirty years, but on his body only within one year, while judgments of the judge of the fair could be executed on both within thirty years. They could also be put into execution in all other parts of the king's dominion without the visa or *pareatis* which was needed for other judgments (*x*).

And not only was this the case, but in title xx. Toubeau shows that fair judgments were in like manner executed in other sovereign countries; and the judgments of the consular courts in other countries, such as Turkey and Barbary, were executed in the same way (*ib.*, title xx.).

Other fair privileges were, that the vendor's lien extended to all the goods of the purchaser and priority in payment was afforded to debts contracted at a fair (*y*).

(*x*) Toubeau, "Institutes du Droit Consulaire," book i., tit. xix.
(*y*) Huvelin, pp. 475-481.

A debtor suspected of the intention to levant could be imprisoned at the expense of the creditor; and, if he escaped, the creditor could obtain an order for execution directed to the authorities of the debtor's country of origin, who thereupon compelled him to appear before the court of the fair or themselves proceeded to enforce execution. For his flight the criminal was subjected to severe punishments and fines, and, if a money changer, his bench of trade was broken and he thus became a bankrupt (*z*).

But the privileges granted to fairs, and especially the restrictions on trading elsewhere than on the fair grounds during the holding of the fairs, and, in some parts, the prohibition of wholesale trading except at the fairs, were resented by those who suffered from such monopolies. From their very nature they were "destined to grow more oppressive and intolerable the more the towns multiplied and the means of communication increased. The people of London were compelled to close their shops during the days when the Abbot of Westminster's fair was open. But a more curious and complete instance of such an ecclesiastical monopoly was that of the St. Giles' fair, at first granted for the customary three days, which were increased by Henry III. to sixteen. The Bishop of Winchester was lord of this fair. On the eve of St. Giles' feast the magistrates of Winchester surrendered the keys of the city gates to the bishop, who then appointed his own mayor, bailiff, and coroner until the close of the fair. During the same period Winchester and Southampton also, although it was then a thriving trading town, were forbidden to transact their ordinary commercial business, except within the bishop's fair or with his special permission. The bishop's officers were posted along the highways, with power to forfeit to his lordship all goods bought and sold within seven miles of the fair, in whose centre stood the "pavilion" or "bishop's court" (*a*).

(*z*) Huvelin, p. 487.

(*a*) Encyc. Brit., "Fairs."

The Spanish legislation and our former statutes against forestalling, regrating, and engrossing were all necessitated by the needs of the fairs and the requirements of fair dealing in the sense of honourable trading. From the very first, and in all countries, the capitalist of the unrestricted school of free trade, unencumbered with inconvenient scruples, must have been tempted to "corner" the wares on the road to the market and resell with the profits of the monopolist and the grinding of the faces of the poor. Hence the legislation, which may have sprung up spontaneously in many different places; though it is to be noted that among the Muhammadans we find one of the earliest examples of the laws in question, which may have travelled westward with the revival of mediæval trade. Thus, in the Code Musulman (*b*) we read: "It is forbidden to buy upon the roads near the towns the commodities intended for the provisioning of the markets, or to buy in the towns by sample the commodities not yet arrived at their destination; provided that the sale shall not be annulled if it is a *fait accompli*" (art. 91). "Every person who lives more than six miles from the town may buy for his personal consumption the commodities which pass before his abode" (art. 92).

It was not apparently until the reign of Edward VI. that these practices became criminal in England by 5 & 6 Edw. 6. c. 14, a statute which was repealed in 1851. The student should refer to "Cruise's Digest."

(*b*) By Khalil ibn Ishak.

PART II.

MEDIÆVAL COMMERCE: A SKETCH.

CHAPTER I.

The Fairs of the Middle Ages.

The Great Fairs (*a*).

It will not be out of place to reproduce by way of introduction the picturesque description of the ancient Stourbridge Fair given by the late Professor Thorold Rogers in his "History of Agricultural Prices in England" (vol. i., p. 141): "This fair was proclaimed on the 4th of September, opened on the 18th, and continued for three weeks. . . . The temporary buildings erected for the purposes of the fair were, by custom, commenced on the 24th of August, the builders were allowed to destroy the corn grown on the spot if it were not cleared before that time, and on the other hand the owner of the soil was empowered to destroy the booths on Michaelmas day, if they were not removed before that time.

"The space occupied by the fair, which was about half a mile square, was divided into streets, in each of which

(*a*) For fuller information the student is referred to the English book on Fairs, by C. Walford, and the French "Essai Historique sur les Marchés et les Foires," by Huvelin (1895), which also contains a good bibliography, of which the present author has availed himself, and to the unfinished German work by L. Goldschmidt.

some special trade was carried on, some of the principal being those of ironmongery, cloth, wool, leather, and books; as well as, in the course of time, every conceivable commodity which could be made and sold. On the 25th of September the chief business of the fair was the buying and selling of horses. The port of Lynn and the rivers Ouse and Cam, were the means by which water-carriage was made available for goods.

"A court of pie powder was held in the fair under the presidency of the Mayor of Cambridge or his deputy, where suits were determined from morning to night, no appeal being allowed. The assize of the fair and its general superintendence were, though not, it seems, without some dispute, the privilege of the Corporation of Cambridge.

"The concourse must have been a singular medley. Besides the people who poured forth from the great towns—from London, Norwich, Colchester, Oxford, places in the beginning of the fourteenth century of great importance and which gave their names, or, in case certain branches of commerce had been planted in particular London streets, the names of such streets, 'to the rows of booths in the three weeks' fair of Stourbridge—there were, beyond doubt, the representatives of many nations collected together to this great mart of medieval commerce. The Jew, expelled from England, had given place to the Lombard exchanger. The Venetian and Genoese merchant came with his precious stock of eastern produce, his Italian silks and velvets, his store of delicate glass. The Flemish weaver was present with his linens of Liege and Ghent. The Spaniard came with his stock of iron, the Norwegian with his tar and pitch. The Gascon winegrower was ready to trade in the produce of his vineyard; and, more rarely, the richer growths of Spain, and, still more rarely, the vintages of Greece were also supplied. The Hanse towns sent furs and amber, and probably were the channel by which the precious stones of the East were supplied through the markets of

Moscow and Novgorod. And, perhaps, by some of those unknown courses, the history of which is lost, save by the relics which have occasionally been discovered, the porcelain of the farthest East might have been seen in some of the booths. Blakeney and Colchester and Lynn, and perhaps Norwich, were filled with foreign vessels, and busy with the transport of various produce, and eastern England grew rich under this confluence of trade. . . .

"To this great fair came, on the other hand, the wool-packs, which then formed the riches of England, and were the envy of outer nations. The Cornish tin mine sent its produce, stamped with the sign of the rich earl who bought the throne of the German Empire, or of the warlike prince who had won his spurs at Crecy, and captured the French King at Poictiers. Thither came also the salt from the springs of Worcestershire, as well as that which had been gathered under the summer sun from the salterns of the eastern coast. Here, too, might be found lead from the mines of Derbyshire, and iron, either raw or manufactured, from the Sussex forges. And, besides these, there were great stores of those kinds of agricultural produce which, even under the imperfect cultivation of the time, were gathered in greater security, and therefore in greater plenty, than in any other part of the world except Flanders.

"To regulate the currency, to secure the country against the loss of specie, and, more harmlessly, to prevent the importation of spurious or debased coin, the officers of the King's Exchange examined into the mercantile transactions of the foreign traders. To form a ready remedy against fraud, the Mayor sat at his court of the 'dusty feet.' A mixed multitude were engaged in sale or purchase: the nobles securing such articles of luxury as were offered them, or which law and custom assigned to their rank—their rich robes of peace, their armour from Milan, their war-horses from Spain. The franklin came for materials for his farm and furniture for his house; sometimes, even, to buy rams

in order to improve the breed of his flock. The bailiffs of college and monastery were busy in the purchase of clothing. And on holidays and Sundays some canon, deputed from the neighbouring priory, said mass and preached in the booth assigned for religious worship.

"After the fair was over, the owner of the field in which the gathering took place resumed possession, and found sufficient profit for the temporary occupation of his land in the additional fertility which the unclean habits of medieval life had conferred upon the soil."

But this picture, though a good one, is incomplete. It omits to notice the numerous pilgrims who in so many cases accompanied the caravans of the merchants, and formed part of the concourse which attracted the more mundane travellers, for in old times fairs and feasts of the Church were almost convertible terms. And it requires the lurid pen of John Bunyan adequately to depict in his parable the sordid side of these immense gatherings: "Almost 5,000 years ago there were pilgrims walking to the Celestial City . . . and Beelzebub, Apollyon and Legion, with their companions, perceiving, by the path that the pilgrims made, that their way to the city lay through this town of Vanity, they contrived here to set up a fair—a fair wherein should be sold all sorts of vanity; and that it should last all the year long. Therefore at this fair are all such merchandises sold, as houses, lands, trades, places, honours, preferments, titles, countries, kingdoms, lusts, pleasures; and delights of all sorts, as harlots, wives, husbands, children, masters, servants, lives, bloods, bodies, souls, silver, gold, pearls, precious stones, and what not.

"And, moreover, at this fair there are at all times to be seen jugglings, cheats, games, plays, fools, apes, knaves and rogues, and that of every kind.

"Here are to be seen, too, and that for nothing, thefts, murders, adulteries, false swearers, and that of a blood-red colour. And, as in other fairs of less moment, there are

the several rows and streets under their proper names, where such and such wares are vended; so here, likewise, you have the proper places, rows, streets (countries and kingdoms), where the wares of this fair are soonest to be found. . . . This fair, therefore, is an ancient thing of long standing, and a very great fair."

It is necessary at the outset to exclude from our consideration the markets which were not fairs, seeing that they were of comparatively small importance, occurring with greater frequency and dealing for the most part in goods produced in the neighbourhood and those of an agricultural nature. A fair, on the other hand, was a much more imposing assemblage, occurring as a rule but once in the year, attended by merchants who travelled from far-distant countries, bringing wares from perhaps more distant countries still. The decadence of the old fair is vividly manifested by such an event as the recent negotiation between the London County Council and the showmen as to whether so-called fairs should longer be allowed under the jurisdiction of the former. To such a depth has the institution fallen that the vulgar amusements appurtenant to the business muster are nearly all that remain of an indispensable and world-wide trade.

But this slow death has only occurred in countries where fairs have ceased to be because they no longer served a useful purpose. Where communications are still difficult or unsafe, great fairs still exist, such as those of Kiakta in Siberia, Nijni Novgorod (*b*) in Russia, and those of Arabia. Books of travel tell of many others.

(*b*) The fair of Nijni-Novgorod, founded in 1524, eleven miles from the town, was in 1817 moved into the town itself and rapidly increased in trade. Before the Great War it covered a space of seven square miles, was frequented by merchants from all parts of the Russian Empire, and was supplied with extensive permanent buildings, the nucleus of the fair. The population would be temporarily increased by about 400,000 persons. In 1889 the value of the goods sold was estimated at nearly nineteen million pounds sterling. Next in importance was the fair of Irbit in

It is difficult for us to realise conditions when the needs of a country could only be satisfied once a year, when all distant wares were carried on the backs of camels, horses and mules in land transport, and in boats for river and sea carriage, and we may well marvel at the energy and organisation displayed by the traders who year in and year out carried painfully their wares for hundreds of expensive miles.

Such journeyings would have been unprofitable without the existence of a sufficient market, and this, at any rate in the later Middle Ages, was secured by synchronising the trade with the observances of piety. We need not stay to consider whether the saint made the town or the town adopted the saint, but relics or miracles brought periodic veneration and recurrent concourse of pious people, ready to satisfy their temporal needs on the same occasion as they performed their religious practices. Thus piety paved the way for commerce; as in more recent times missionary zeal has often blazed the way for trade.

It will be remembered that until 12 Edw. II. fairs were frequently held in churchyards in this country, while the Germans used the word *Messe* to designate a fair, which really only opened after High Mass. The South German word *Dulte*, used with the same meaning, brings to mind the time when the trade in indulgences was an important element in times of licence, such as fair times too often were (*c*). The abundance of market crosses, too, reminds us that fairs and markets were habitually under the protection of the Church, which proclaimed and generally was able to enforce the Peace of God.

The Spanish word for fairs and Church festivals was

the Government of Perm, and those of Archangel and Riga followed. By the treaty of Nirchinsk in 1689 the town of Kiakta in Siberia was made the sole trading station between Russia and China, but its importance dwindled with the throwing open of the Treaty-ports.

(*c*) See H. Morley's small work on English fairs, p. 18.

formerly the same, namely, *feria*: a word which in its plural form is now reserved for the gathering for trade.

It may enable us to some extent to realise the great part played by fairs in the ancient world if we refer to the account given in the Bible of the great development of trade in Palestine in the time of King Solomon, who availed himself of his hereditary friendship with the King of Tyre to join in the trading ventures of that opulent city and region. Once in three years came the ships of Tarshish, called, it is thought, from being of the build of the vessels hailing from Sevilla, of which Tarshish is said to have been the ancient name; and they brought gold and silver, ivory, apes, and peacocks, the time and the wares showing that they had travelled a long voyage, perhaps as far as the East Coast of Africa; though, after Carthage began to flourish, the African West and South Coasts were left to the traders of that city. So in Ezekiel's account of the doom of Tyre we learn something of the vast extent of the caravan and sea traffic and the great variety of the wares which occupied the markets of that powerful emporium, which, at that time (B.C. 588), as for long before, was with its sister towns the largest trade centre of the East Mediterranean.

The fairs, which may not have been quite what we mean by the term, embraced, as we read, precious and other metals, horses, mules, lambs, rams and goats, precious stones, fine linen and other rich apparel and cloth, embroideries, spices, and "persons of men." A thousand years or so before the Doom was pronounced a company of merchant Ishmaelites or Midianites came through Gilead with their camels bearing spicery, balm and myrrh into Egypt, and on the way they bought the youth Joseph for twenty pieces of silver, two pieces for each vendor, and sold him in Egypt to Potiphar at an unknown price. The brothers seem to have stript the lad—perhaps to conceal his condition. At any rate, this expensive garment was not included in the sale. At a later date the sellers found

pieces of silver in their corn-sacks—a biting reminder of the cruelty of their money-lust.

It is not possible to give here a full account of the great caravan routes of the East, nor to do more than state that to the great ante-Christian fairs of Mesopotamia and Arabia merchants travelled from as far as India and China. After the taking of Tyre by Nebuchadnezzar, the trade again revived, only to be finally crushed by the cruel destruction of the city by Alexander, called "the Great," in 332 B.C. But later on the Romans traded overland with China, Marcus Aurelius even sending an embassy there, while Ammianus Marcellinus says that in his time (he died at the close of the fourth century A.D.) there was a great fair for merchandise of India and China at Batanea on the left bank of the Euphrates (*d*). In the time of Ptolemy even Burmah was mapped.

For an adequate description of the caravan routes, such as were in existence in the palmy days of Tyre and Sidon, and indeed long after their destruction, it were well to refer to chapter X. of "The Phoenicians," by G. Rawlinson, and to "The History of Merchant Shipping and Ancient Commerce," by W. S. Lindsay, who (pp. 86 etc.) pictures caravans of 4,000 camels and from 1,000 to 2,000 persons travelling along the four main routes to Palmyra, Petra, Sardis, Babylon, Gerrha, Damascus, Susa, Thebes and Memphis; of which four the route to Arabia was the most frequented, as this country was the southern emporium for Indian and Ethiopian merchandise. For this trade the city of Alexandria became the chief naval exit from the time of its foundation, a great fleet leaving once a year to the West Coast of Africa, while another sailed down the Red Sea to India. Needless to say, general trade from the East was destroyed by the Muhammadan invasions, but, as far as France was concerned, we are told that the merchants of

(*d*) "Relations Politiques et Commerciales," by J. T. Reinaud, pp. 184, 189, 267.

Lyons, Marseilles and Avignon in the reign of Charlemagne again opened up trade with Alexandria under the protection of Haroun el-Rashíd (*dd*).

The welcome and protection afforded to strangers greatly contributed to the trade of ancient Greece, which, from its geographic conformation, was, as it must always be, pre-eminently a maritime country. Maritime also was the commerce of the island cities, Delos being a great *entrepôt* where fairs were held during the annual fête of Apollo. François Toubeau, himself an ex-judge of the consular court at Bourges, in his well-known work (*e*) published in 1700, sketches with rapid pen the fairs of classic times. Thus he quotes Isocrates, who says that in the land of the Athenians, unable to produce everything, it was by the establishment of the market at the Piraeus that what could hardly be found in each province was there to be discovered as in a warehouse. In fact, one may say that all nations came together at the fairs and ate at the same table, where each one contributed his dish and each had all he wanted, having only to reach out the hand to have the produce even of the most distant countries. He proceeds to mention the existence of fair judges in many countries and quotes Spelman's "Glossary": "there is a court or jurisdiction in the fairs, for the causes which there arise, the judges whereof are called pie poudre," from their expedition being such that there is barely time to shake the dust from the feet. Toubeau, among other instances, quotes the history of Lopez de Lomara (chap. 39), to the effect that, although they had thought the Mexicans barbarous and unpolished, they had at the time of the Conquest twelve judges in the market of Mexico City, who tried off-hand the processes which arose in the place from trade. In fact, continues Toubeau, "it is at the fairs that the grand commerce is conducted and greater and greater business is done between

(*dd*) *Ib.*, p. 344.
(*e*) "Institutes du Droit Consulaire," book i., tit. xiii, ch. iii.

all kinds of persons and nations, since historians say that the town of Dioscurias (*f*) was a market for seventy-eight nations of different tongues, and that Lyons was called by Julius Caesar, Eusebius and Strabo, the great and celebrated market of all Europe. Merchants of all nations are still to be found in all our fairs; and there it is that judges and consuls should possess experience, and like the scribes among the Jews, or like Mithridates, should know seventy languages for rendering justice the more surely, hearing the parties by word of mouth."

It has already been pointed out that the existence of fairs indicated want of security and difficulty of communication, and it is not therefore surprising that the safety of trade guaranteed by the Pax Romana caused this method of conducting commerce to decline, the Mediterranean becoming a great commercial lake. This fact caused the decadence of some of the inland fairs, while it greatly added to the trading importance of many seaside towns and those in the greater safety of a navigable river. But in other ways this same peace guaranteed the quiet of the numerous fairs which were founded and favoured on the frontiers of independent and often hostile nations. Not infrequently these were held on ground neutralised for the purpose under agreements for the regularity of markets by preserving the peace and securing the safety of the attendant merchants and their goods. The German frontier was one of those where fairs were established, and this is supposed by some writers to have formed the first introduction of commerce among these warlike tribes, who, until stopped by the Romans, had been steadily moving to the West (*g*).

This state of things, says Huvelin, continued until the Goths overflowed France, about the year 400, by which time the Roman and Greek trade terms had been adopted, together with their weights and measures. At this time some at least of the frontier fairs ceased to be held.

(*f*) In the Caucasus.

(*g*) Huvelin, p. 140.

But even in England frontier markets have not been unknown, for in the treaty of peace between Alfred the Great and Guthrum, art. 5, we read: "And we all declared, on the day when the oaths were sworn, that neither slaves nor freemen should be allowed to pass over to the Danish host without permission, any more than that any of them (should come over) to us. If, however, it happens that any of them, in order to satisfy their wants, wish to trade with us, or we with them, in cattle and in goods, it shall be allowed on condition that hostages are given as security for peaceful behaviour, and as evidence by which it may be known that no treachery is intended" (*h*).

When we approach the subject of the institution of the mediæval fairs, which we must now attempt and which are the more germane to our purpose, it is necessary to bear in mind that the origin of many is lost in obscurity, and that it can rarely be assumed that an apparently initiative grant of the right of holding a fair is anything but a confirmation of a market held under ancient custom for perhaps hundreds of years.

It has already been observed that merchants were apt to resort where any great concourse of people was to be expected with regularity, and that few of such gatherings were so constant or so great as those which, in times of more vivid beliefs, were wont to assemble for the great festivals of the Church, held in honour and veneration of the patron saint. On the other hand, what more likely to increase the attendance at these pious practices than the opportunity of satisfying the needs of the household from the travelling trader, who alone could replenish the depleted stores, and that generally but once a year? It is not to be wondered at that the Church threw its protection over the merchants and enforced the Peace of God at the fairs and during the journeys to and fro. The richest towns, says Huvelin, are those which have the best relics.

(*h*) "Laws of the Earliest Kings," F. L. Attenborough, p. 99.

Whatever may have been the origins of the older fairs, it is to be noted that, as the power of the great chiefs increased, they assumed the power of granting a fair franchise, as profitable both to the populace by encouraging trade and to themselves as the recipients of revenue, though the instances are not few in which for the good of their souls they granted the tolls and other emoluments to some monastery or cathedral church, together, on occasions, with the jurisdiction over the fair. The earliest known grant of this nature was made in the year 629 to the monastery of St. Denis, near Paris. The fair, however, must have been an old one, since the charter mentions that it was attended by Saxons, Frisians, Lombards, Spaniards and Provençaux, that it was held annually for four weeks along the road from St. Denis to Paris. Little was done to foster trade officially until the accession of the Carlovingian dynasty, when orders were made confining it to special places and times (*i*), selling at night being forbidden in order to make oversight more easy. Selling to unknown foreigners was restricted, dealing in "futures" was made unlawful, and maximum prices were fixed. Sales of horses, arms and Christian slaves to hostile foreigners were prohibited, and merchants were not allowed to cross hostile frontiers. Many German fairs owe their origin to this time of development.

The influence of the Church began to make itself felt in enlarging the scope of international rights and enforcing good faith and loyalty by such methods as she could employ, and in the attempt, ultimately unsuccessful, to prevent business being conducted on Sundays and saints' days. The right and profit of local coinage was sometimes added to the grant of fairs, particularly in eastern France, where money was most scarce; and not infrequently the right of police and justice was included in the grant, which had the effect of facilitating the enforcement of summary justice and the law of the market, apart from the ordinary king's

(*i*) Huvelin, pp. 146, 266.

jurisdiction and the common law. Huvelin notes (pp. 175-183) that jurisdiction was often in France usurped by the grantees of the fairs, and that great lords would presume to create fairs and usurp jurisdiction, at least up to about 1275. From this time onward the increase of the royal power gradually enabled the kings to resume the right to grant fairs with the help of jurists, who, having recommenced the study of Roman law, supported the royal claims by the Digest of Justinian.

As in the older times, so in the feudal, the fair grounds were the only places where wholesale trade was carried on, and this only for a limited period. Permanent commerce was a sort of contraband. On the other hand, foreign merchants, being generally forbidden to trade except at the fairs, took care that this restriction was observed. In the Ordinances of Edward the Elder, c. 1, we read: "My will is that every man shall have a warrantor (to his transactions), and that no one shall buy except in a market town; but he shall have the witness of the port-reeve or of other men of credit who can be trusted." A fine was imposed for trading outside a market town, but apparently the transaction stood (*k*).

In the Ordinances of Æthelstan, c. 12 (*l*): "We have declared that no one shall buy goods worth more than 20 pence, outside a town; but he shall buy within the town in the presence of the port-reeve or some other trustworthy man, or again, in the presence of the reeves at a public meeting. And we declare . . . that all trading shall be carried on in a town."

Shortly after, this injunction was abrogated. The objects apparently were to prevent forestalling or cornering the market, to prevent imposition on the countryman, and to protect the revenues of the market place.

(*k*) "Laws of the Earliest Kings," by F. L. Attenborough, p. 115
(*l*) *Ib.* p. 135.

Safe-Conduct and the Peace of the Fair.

Self-protection caused travel in company and an ever-ready watchfulness in self-defence. At first, both by sea and land, merchants defended themselves, but in land transit it became the custom to purchase safe-conduct from the chiefs and lords of the countries through which the caravans passed, not an unreasonable arrangement, for protection in wild times means expense.

George Yver (*m*) tells us how the Florentine merchants trading into South Italy had to defend themselves from brigands by mounted men-at-arms during the Angevine epoch (p. 75), and how the monetary instability, the insecurity, the rarity and difficulty of communications, excessive inspections, the variety of weights and measures, the ill-will or arbitrary conduct of the royal officers conspired to trouble commerce and to trammel its progress. But this, he remarks, was the case throughout Christendom generally. "France, England and Germany in the fourteenth century enjoyed no better administrative system, no more equitable system of finance, and no greater security."

The peace of the fair constituted the great and outstanding essential to its success. Without the assurance of safe-conduct and safe-residence no merchants could have found it worth their while to travel, while in the absence of these institutions it is difficult to guess how the requirements of increasing needs and luxuries could have been supplied. To travel alone and unprotected was to invite attack and plunder.

Gradually in Europe, with the decay of the power of the great lords, due to a great extent to their sacrifices and exhaustion through the wars against "the infidel," the peace of the king superseded the peace of the lord.

Toubeau quotes several safe-conducts, beginning with one

(*m*) "Le Commerce et les Marchands," p. 312.

granted by Alaric the Goth, King of the Romans, and he mentions a charter of December 1200, by which Philippe takes under his protection and safe-conduct the foreign merchants attending the fairs of Champagne with the promise to give them three months' warning if they are not to come.

CHAPTER II.

The Course of Trade in the Middle Ages.

It has already been said that, had travel been secure, there would have been no great need for caravans, fleets in convoy, or letters of safe-conduct; but on the other hand, absence of security may be so severe, as in the case of war, that even trade expeditions become too risky. Thus, at the time when the Saracens were harassing and attacking the Italian and French littorals, and plundering all too venturesome vessels, we are not surprised that trade languished in the Mediterranean. With the cessation of Saracen aggression in the tenth century, the great cities of Venice, Genoa and Pisa, which had perforce increased their maritime strength to protect themselves from their merciless enemies, were at leisure to devote themselves and their fleets to the more congenial pursuits of trade (*a*). By 1096 they were numerous and powerful enough to carry the hosts of the faithful in the first Crusade to redeem the Holy Sepulchre from the infidel. But the time of the millenary year after the birth of our Lord was one of unrest, not only in the excited spirits of the superstitious, but in all races; and it was not until the dreaded anniversary had passed without bringing the end of the world that any considerable revival could take place in international commerce. As regards France, the ninth and tenth centuries had been times of politic and economic anarchy. The Normans had devastated the North and the Saracens the South, and the result-

(*a*) See "Relations Commerciales entre la Flandre et la République de Gênes au Moyen Age," by J. Finot, p. 8, etc.

ing misery, poverty and famine completed what war had begun. The countryside had become devastated and sterile, but with the definite establishment of the feudal regime and the reassertion of the influence of the Church, rendering existence more stable, there was everywhere what has often been referred to as a renaissance of art, thought, economic and social life. The world again began to hope and trade to flourish. A decisive impulse was given by the Crusades, which opened the ways to the East and made new outlets for cosmopolitan commerce. The centre of this new movement was in Italy, and the renascent cities of the North found a new source of wealth in the interchange of the riches of the East and the products of the West. While the Venetians directed their attention chiefly to the East, the cities on the West side, chiefly Genoa (*b*), Pisa and Florence, forming great trading associations, overran France, of which the chief fairs were held at Champagne and Brie; and the French fairs in general, of which many new ones were started, "attained a degree of prosperity which had never been reached and has never been surpassed."

Imbart de la Tour, in his book on "La Loire" (p. 6), mentions that the Loire is the second longest river of Europe, that it was used by merchants from Marseilles, who brought back British tin from St. Nazaire in the times of the Romans, that under the Roman Emperors there were *communautés des marchands* on the river and at Rouen and Paris, with special immunities in return for regularity in bringing alimentary supplies and facilitating transport. In the Middle Ages there was also the London community, to which were affiliated a number of towns in French Flanders, Picardy, Vermandois and Champagne.

"If one takes a bird's-eye view of the geographic grouping of fairs, one quickly notes that the most important of them are established on a line running from south to north,

(*b*) But Genoa at times more than rivalled Venice in the trade of the Black Sea.

from Provence to Flanders and England, following the valleys of the Rhone, Saone, Seine, Marne, Oise, Somme and Scheldt."

The towns of Montpelier, Nimes, Beaucaire, Lyons, Châlons, Besançon, Langres, Troyes, Paris, Beauvais, Arras, Calais, Thourout mark the general directions. Other more restricted groupings are scattered through the whole of western Europe and mark the meeting-points of the commercial roads frequented in the twelfth century (*bb*).

The fairs of Champagne and Brie had a universal importance from the twelfth to the fourteenth centuries, and chiefest among them were two held at Provins, two at Troyes, one at Bar-sur-Aube, and one at Lagny-sur-Marne. Many were of ancient date, it being known that Troyes had a fair as early as the fifth century. The movement of wealth associated with these fairs exercised a colossal influence on the commerce of the whole civilised world. Among the attending foreigners, the Flemish and Italian merchants, the latter often generically termed Lombards, were the most numerous and wealthy. "All the great commerce by land and sea, and especially that of money and credit, was in the hands of the Lombards, who were constituted in powerful associations. Alongside of them were the Provençaux, the merchants of Cahors and the Jews, with merchants from very various countries, England (*c*), Scotland, Flanders, Brabant, Hainault, Germany, Savoy, Spain, and even the East" (*bb*).

In the fourteenth century the fairs of Champagne and Brie began to decline, and a century later they had lost their exceptional importance. This was partly due to fiscal exactions, partly to the expulsion of the Jewish money-lenders, partly to the Black Plague, and partly to the fact that Champagne became dependent on the French Crown

(*bb*) Huvelin, pp. 243, 251.

(*c*) "At the fair of Lagny in Bresse the English merchants were so numerous that one of the streets got its name from them (Vieus Angliers)." "Roman Law in England," Sir P. Vinogradoff, p. 87.

and so immediately involved in the fortunes of the Hundred Years' War. The Rhone was deserted for the Rhine, the caravan for the convoy, and so the Flemish and British markets were reached. So says Huvelin; but this is but a partial account of the change in the course of trade, for we shall see that the greater part of this through commerce became waterborne and direct.

The close of the Hundred Years' War, the fall of the power of the feudal nobles and the concentration of authority in the royal hands, gave fresh impulse to such of the old fairs as survived this prolonged calamity and occasioned the creation of several new trade centres in France (*d*).

The Renaissance was not only one of learning, but of commerce and general prosperity, which continued until the outbreak of the religious wars in the latter half of the sixteenth century, and the synchronous economic crisis which affected all western Europe and was caused by the great influx of gold from the lately discovered America. Both Spain and France were bankrupt.

With the promulgation of the Edict of Nantes in 1598 peace again returned to France, and with peace a revival of commerce and general prosperity. Nearly a century later Colbert particularly favoured the fairs, and for their advantage ordered the roads to be kept in good order, the fleet to cruise for the protection of the ships attending the fair of Beaucaire, then the most important in the kingdom (1669), and directed the royal ships to buy for their wants so far as possible at these gatherings. Under his régime, says Huvelin, numerous fairs were instituted, while older fairs flourished exceedingly, that at Bordeaux attracting as many as 500 vessels instead of the usual 100 which were to be found in that port. From the death of Colbert the prosperity of France and of her fairs declined from many causes

(*d*) Without further details we mention the reconstitution of the fair of Lyons, which had been an ancient trading city, and the constitution of the fair of Geneva.

which need not be here specified: but chiefly from the improvement of communications, from internal peace, and from over-regulation, while the revocation of the Edict of Nantes in 1685 drove the Protestant merchants abroad, and fresh wars stopped the internal trade. Fairs in England, Spain and Italy were also declining, the fairs of Germany alone retaining their importance; the movement was going eastward into the less-developed countries. The bulk of the German fairs were founded a century to a century and a-half after those in France, and did not attain their apogee until after the decline of the French. The chief German fairs were at Frankfurt, Köln and Leipzig, and in Austria Bolzan, all of which have lasted to our day.

It would seem, says Mr. W. Cunningham, that the early German fairs were "little else than slave markets, and it may well be that at the fairs which the northern merchants held on the shore of the Baltic the captives they had kidnapped formed the staple article of trade" (*e*).

In leaving the French fairs we may be allowed to refer to the late Mr. Bent's book on "Genoa," where he urges that the Italian merchants frequenting the fairs of France implanted in the south their spirit of independence and love of republicanism, it being from this region that the seeds of liberty, equality and fraternity spread northwards. Contiguity, however, was enough in itself to account for this development, merchants, in general, not being very ardent politicians.

Italy.

We must here say something more about the extension of internal trade in Italy itself from the time when the seas were substantially cleared of the Saracens and the era of

(*e*) "Growth of English Industry and Commerce," 3rd ed., p. 86. See essay on the slave trade, by G. J. Thorkelin.

the Crusades had begun. It may be repeated that the great centres of this commercial renaissance were in the north, that Genoa and Venice were the two rival trading cities, that Florence was *par excellence* the banking and financial centre, while Pisa was in a smaller way engaged in both directions. Goods were carried to the rest of the land chiefly by the powerful fleets of Venice, Genoa and Pisa, and it was mostly in connection with their operations that the fairs flourished. In South Italy (*f*) Frederick II. founded fairs at Salmona, Capua, Lucera, Bari, Tarento, Cozenza and Reggio, and following his example the Angevin kings founded many more, either of their own accord or at the instance of lords anxious to increase their revenues. Beginning in March with the fair at Gaeta, the traders passed to St. Maura, Brindisi, Salmona, Capua and Manfredonia in May; Molise and San Severo in June; Lucera (Santa Maria) in March and July; and in the latter month to Bari and Vico; to Barletta, Ortona, Diano and Tarento in August, then to San Severino and Cosenza, and, most important of all, to Salerno, which had been founded in 1259 by Manfred, and was under the protection of St. Matthew. This fair, which lasted nine days, drew an immense concourse of merchants from all parts of Italy, owing to the freedom from tolls granted by the founder. The prosperity of the fair appears to have continued under the Angevin rule, for towards the end of the reign of Robert of Sicily we find the court taking the necessary measures to assure the safety of the travellers resorting thither, while the barons and towns of the neighbourhood came to an agreement to repair the roads and to guard dangerous places by armed forces. The close of this important meeting almost coincided with the opening of that of Amalfi, granted by the same Manfred to the family of Alagno, and

(*f*) "Le Commerce et les Marchands dans l'Italie Meridionale au 13e au 14e Siècles," by George Yver, Paris.

which was held yearly near the seashore on the kalends of October. The business movement caused by these two gatherings was so considerable as to bring a remarkable increase of coin in Naples during the autumn. The fairs of Tricarico and Salmona in October were of no great importance, and the commercial year ended in the early days of November at Barletta or Bitonto.

The fairs of Italy, however, which we have just mentioned, had no great international importance, as owing to the enormous foreign trade of the North the true Italian fairs were in other countries—in France, Spain, Portugal, England, Flanders, and Holland. But it was through that country that the system of organisation and administration of the fairs came, including the consuls, the administration of justice, the customs of the money-changers, the methods of payment, the liquidation of bankrupt estates, etc., as to which our readers are referred to the earlier chapters on the law merchant.

The decline of these fairs was due partly to official interference and over-taxation and partly to the internecine wars which were so marked a characteristic of the mediæval history of Italy (*g*).

In "The Mesta, a Study in Spanish Economic History," Dr. Julius Klein, of Harvard, mentions that the pastoral products of the migrating herds in Southern Italy were, from the Central Middle Ages down to the eighteenth century, sold exclusively at the annual fair at Foggia under strict royal supervision. "The operations of these itinerant trader-herdsmen covered all the corners of the realm; and it was undoubtedly this very characteristic, and the consequent impossibility of enforcing any of the exacting stipulations which were held by mediæval public opinion to be so indispensable in all economic relations, that led to the insistence upon the restriction of all their marketing to one

(*g*) G. Yver, pp. 74, etc.

point . . . . largely for fiscal purposes. More especially, however, it was intended to facilitate the inspection of quality, the maintenance of prices, and the regulation of supply, which were the essence of the local market in the Later Middle Ages " (p. 30) (*h*).

(*h*) Further information on the Italian migratory flocks is to be found on pp. 154 and 298.

CHAPTER III.

Venice.

Shylock: He hath an argosy bound to Tripolis, another to the Indies. I understand moreover upon the Rialto, he hath a third at Mexico, a fourth for England, and other ventures he hath, squandered abroad.

Portia: And I have better news in store for you
Than you expect: unseal this letter soon;
There you shall find, three of your argosies
Are richly come to harbour suddenly.—*The Merchant of Venice.*

It is not proposed to enter into any details with reference to the commerce of Venice and the Venetian Republic, except for the mention of the early interest taken and preserved for centuries in the trade of the East. Apart from that it is sufficient to say that she distributed the goods bought in the East chiefly by shipping in Italy and by caravan through Northern Italy to France and over the mountains to Germany, thus supplying the fairs over extensive areas, including Flanders and England. Her fleets also carried goods to Spain, Portugal, England and Flanders, as well as to the Black Sea. The Eastern trade seems to have commenced about 585, when envoys were invited and sent to Constantinople, when they received assurances of the protection of the Imperial forces, together with full liberty and safety for trade. Alexius about the year 1085 issued a golden bull granting to all Venetian ships free entry and exit for ships and cargo into and from every Eastern port; and in Constantinople and other towns a large number of shops, warehouses and magazines were set apart for the merchandise and traffic of Venetian traders exclusively (*a*).

(*a*) "Venice," by Alethea Wiel, p. 79. There are, of course, many more authorities to which reference might be made.

To protect her commerce she took part in the Crusades, and as a reward was allotted in many towns extensive trading areas, though in these privileges she was rivalled by like grants made to the Genoese and Pisans, and from these times began the intense trade jealousies which ultimately weakened and contributed to the downfall of both Genoa and herself. Writing of the commerce of the republic as it existed after the sack of Constantinople by Dandalo in 1204 we read: "The rod of Venetian empire stretched over the Black Sea from the Hellespont to the Sea of Azof. The towns where her merchants collected, and where a small patch of Venetian territory afforded safety and equity to her subjects, included Laodicea, Bursa in Bithynia, Scutari, Sinope, Nicaea, Nicomedia, Amiso, and Trebizond; while further westward she traded with Apollonia, Silivrea, Rodosto, and Gallipoli; with the Crimea, Turkey, Armenia, Arabia, and even with Mongolia and Tartary. The traffic she carried on in Asia with India, China and other countries of the East was brisk and active. . . . Every year convoys of from eight to ten merchant vessels sailed to the Black Sea and Roumania; from six to eight sailed to the Crimea; the same number went to Trebizond; others to Cyprus, to Armenia, Apulia, and the coasts of Spain and Portugal; others again to England, France, and Flanders, where at Bruges and Antwerp the Republic had large emporiums (*b*).

About 1423, writes our author, "she had reached the topmost height of her glory and magnificence; her fleets traded in every part, and commanded all the commerce of the known world; her trade with Milan and Florence alone brought in a capital of ten millions of zechins; her mercantile navy numbered 3,300 private ships; 45 public galleys aided and protected the merchant vessels; and the number of her sailors was 36,000" (*c*).

(*b*) "Venice," by Alethea Wiel, p. 179. (*c*) p. 254.

CHAPTER IV.

From Genoa to Flanders.

A Merchant was there with a forked beard,
In motley, and high on his horse he sat,
Upon his head a Flandrish beaver hat.
His bootës clasped fair and fetishly.
His reasons aye spake he full solemnly,
Sounding alway th'increase of his winning.
He would the sea were kept for any thing
Betwixtë Middleburg and Orëwell.
Well could he in exchangë shieldës (*a*) sell.
This worthy man full well his wit beset;
There wistë no wight that he was in debt,
So estately was he of governance
With his bargäins, and with his chevisance.
For sooth he was a worthy man withal,
But sooth to say, I no't how men him call.

—*Chaucer's Canterbury Tales, Prologue.*

Among the merchants who frequented the early fairs of Champagne and Brie, none were of greater number or financial influence than those of Genoa, who there met their brethren of the North who came from Flanders to exchange the wares for the goods offered by the traders from the South. We have already shown the reasons for the decline of these fairs, reasons which were sufficient to repel the trading ardour of the Flemings. But there was an alternative route, already to some extent in use, the way by sea, and this eventually supplanted almost entirely the through trade, which at its greatest must have amounted, according to Huvelin, to more than 200 million francs in modern money per annum.

(*a*) Crowns, so called from the shield stamped on them; *écu, scudo.*

Jules Finot (*b*) shows that the trade of Genoa with England and Flanders, from being a land trade carried on by merchants meeting at the fairs of France and through permanent branches which the Genoese maintained at such places as Saint Gilles under a treaty with the Count of Toulouse, came, on the rise of the maritime power of Genoa after the Saracen attacks of the tenth century had ceased, and the French fairs had begun to decay, to be more and more a sea trade. There was also an alternative land route through what is now Germany, the greatest *entrepôt* being at Köln. But the principal reason for adopting the sea and the German routes was an edict of Louis le Hutin in 1315 prohibiting the Flemings frequenting the fairs of Champagne; for a long war between France and Flanders had broken out. We have two epochs fixed for us, the first when, as a result of the Third Crusade, the Genoese cut into the Eastern trade of the Venetians and carried wares to France, where they began to attend the fairs of Champagne in 1193, and the second when the war of 1315 closed the French road and forced resort to the sea, a route which had the additional attraction of affording visits to the Spanish and Portuguese trading harbours. The subsequent rival attempts by England, France, and Flanders to attract the Genoese merchants are too long to detail, but it may be mentioned that in 1344 a request was made by Parliament that wools should be sold direct to foreign merchants instead of being sent exclusively to Flanders as beforetime, that in 1353, by Letters given in the Parliament of Westminster, Edward III. assumed to organise the Genoese and other Lombards and the merchants from Germany into North and South consulates, and in 1357 admitted all Genoese especially to come and trade in wool (*c*).

In 1395 a treaty of commerce and amity was made

(*b*) "Relations Commerciales entre la Flandre et la République de Gênes au Moyen Age," pp. 14, 20.

(*c*) "London City Records," book G., f. 62, August 4.

between the Flemings and the Genoese on terms of offering goods in Flanders before England, and following on this the latter established their staple at Bruges, of which the port was l'Ecluse, and built their consular house in 1399, either rebuilding or enlarging it in 1441. This greatly increased the importance of Bruges as the centre of the commerce of the North of Europe, from which the goods of the North and South were exchanged and dispersed, and so it remained until the silting up of the river Zwyn, which about 1500 caused the bulk of the trade and the merchants to move to Antwerp, though the Spanish wool trade remained much longer (pp. 122, 221). An earlier centre than Bruges was Duurstede on the Rhine, whence the Frisians exported woollens from 800 and where Charlemagne coined money (*d*).

(*d*) Prof. A. Bugge, in the "Saga Book of the Viking Club," vol. vi., p. 13.

CHAPTER V.

Spain and Portugal.

The materials for giving information about the fairs in Spain, so far as known to the author, are scattered and not very complete. The fullest book dealing with the foreign trade of this country during the Middle Ages is by M. Jules Finot (*a*) to which reference will be made under his name. We know, however, that in addition to the iron trade of the North there is " ample evidence of an extensive sheep-raising industry in Spain and of the high quality of Spanish wool in the earliest sources of recorded history of the Peninsula " (*b*), and from our general knowledge of the usual and only method of marketing in old times, we may infer that the wool sold in the country was disposed of at fairs. " At least as early as the twelfth century there had grown up a more or less irregular exportation of Spanish wool to England," but this trade was forbidden by Henry II. in 1172, and it was not until after the first known charters granted to the Mesta in 1273 and 1276 that the fine Castillian wools began to appear in our ports with any regularity. From 1303 onwards the customs reports of Southampton, Sandwich, and Portsmouth note the arrival of Spanish wool almost every year. Factories were founded abroad, notably in Bruges, London, La Rochelle, and Florence, while the foundation of the Consulado of Burgos in 1494 was directly designed to market the wool, " to expedite shipping by organizing the exportation of goods in fleets, to prevent fraud and theft by merchants and inter-

(*a*) " Relations Commerciales et Maritimes entre la Flamande et l'Espagne au Moyen Age " (Annales du Comité Flamand de France).
(*b*) " The Mesta," by Dr. Julius Klein, of Harvard.

mediaries" (*c*). This consulado was the model for the more famous Casa de Contratacion established in 1503 at Sevilla, which controlled the whole trade with Spanish America.

The origin of the Mesta, which was the great association of all the owners of the migrating flocks of Castilla, is lost in obscurity, but we know that the great biennial fairs of Medina del Campo were based on the monopoly of the sale of the resulting products, with the special privilege of being on fair days the common centre of commercial payments of the subject portions of the Peninsula, particularly of insurances and drafts, those even of the Royal Treasury. The fairs were held in May and October, with the crowded concurrence of natives and foreigners, brokers sent by the bourses, bankers and exchangers. Altamira (*d*) says that clearing arrangements existed by which coin was economised and balances only were settled. The Consulado of Burgos had jurisdiction over fair-disputes.

In order to appreciate the antiquity of these fairs, it is useful to refer to the ancient codes of Spain, with the assurance that the institutions which they were intended to control were of old standing at the times of their promulgations; but we may first copy what is said by R. Blanco Fombona (*e*). "It is notorious that by the time of the great and passing apogee of Spanish trade, the important fairs of Medina del Campo, Valladolid, Burgos, Villalon, and Rio Seco, etc., and especially the first named, were centres of great international commerce, Medina del Campo having, in fact, been the emporium of a large and fostered wool trade since the end of the eleventh century. With the advent of gold and silver from the New World and the depopulation of Spain through the expulsion of the Moors and the Jews in 1492, and the drain on the manhood of the

(*c*) "The Mesta," by Julius Klein, ch. iii.
(*d*) "Historia de España," vol. iii., p. 463.
(*e*) "El Conquistador Español," p. 130.

country through distant enterprises, the trade of Spain rapidly declined and the great fairs became little more than centres for the settlement of accounts. The economic measures taken by the Crown interfering with the natural course of trade, hastened the decline, and Spain became the poorest and most wretched of European countries."

The existence of foreign trade, and, as an almost necessary consequence, of fairs, is evidenced by so early a body of laws as the Latin Code of the Visigoths of 506, known by a later name as the Fuero Juzgo. The Spanish version of 1241, made under the orders of Fernando, says in this relation (Book xi.):—

"If the merchant of oversea ports sells gold or silver to a man of our kingdom, or cloth or clothing or other things, if the things are bought at a reasonable rate, although they be the proceeds of theft, he who has bought them ought not to incur calonna (penalty) although they are proved to be stolen. Law 1.

"If the merchants of oversea ports have any action among themselves, no judge of our land ought to judge it; but they must answer according to their own laws and before their own judges. Law 2.

"We forbid all merchants to take away with them a slave of our kingdom. If anyone does so, he owes the king one pound of gold and receives besides 100 stripes. Law 3."

Law 4 refers to foreign merchants hiring native slaves. The Fuero Real of about 1500, in Book 3, titles x. and xi., contains several laws on buying and bartering. Law 1 ordains the use of proper and just weights and measures, the same in dealing with foreigners as with natives. In the "Recopilacion de las leyes de las Indias" and its later editions many laws appear in Book 9, title iv., directed to honesty of dealing by merchants, the keeping of proper books of account, etc.

Alfonso the Wise endeavoured with success to develop the

sea trade with England, France, and Flanders, and in 1281 founded the Spanish trade-house at Bruges, at a time when his subjects, in league with the Genoese, were successfully fighting the Moors for the freedom of the Straits of Gibraltar (*f*).

Under this progressive monarch, and at his direction, was drawn up the celebrated code known as Las Siete Partidas. Partida V., title vii., deals with merchants, and runs as follows:—

"Law 1. Of merchants; of fairs and markets; and of the impost of the tenth part, and of the tolls which are paid in this respect.

"By merchants, properly so called, are understood all those who buy things of others with the intention of selling them again for the sake of the profits they thereby acquire. And what merchants have to observe is this: They ought to conduct their business honestly, without mixing with the things they have for sale others which adulterate and deteriorate them. They should, moreover, be careful not to sell knowingly one thing for another: to make use of just weights and measures, such as are customarily used in the country or kingdom where they reside. And when they transport their merchandise from one place to another, they ought to pass along the ordinary roads, and to pay the tolls and taxes to those who are entitled to receive them; and if they contravene these provisions, they will incur the penalties prescribed in the laws of this title.

"Law 2. Of unlawful trade agreements, etc.

"Merchants sometimes enter into covenants and agreements and form associations under oath, promising to adhere to one another, and fixing among themselves the price at which they will sell cloth by the ell, and other things by the weight or measure, and agreeing that they will not sell

(*f*) "La Marina de Castilla," by Fernandez Duro, pp. 36, 38, 46, 48.

for a less price (*g*). So, likewise, artisans fix among themselves the price at which they will sell the things they manufacture in the way of their respective trades; and that no other person shall work at such trades, except those who are admitted to their fraternity, and that no member of the fraternity shall finish any work that had been begun by any other one of their members. They, moreover, sometimes agree not to instruct any other person in their respective trades, except those who have descended from members of the association. And inasmuch as great evil may hence arise, we prohibit such combinations, conventions, and agreements, as are above mentioned, or other similar to them, from being made without the knowledge and consent of the King; otherwise they shall not be valid.

"Law 3. Of fairs, markets, etc.

"Fairs and markets, where men use to make sales, purchases, and exchanges, must not be held in places other than those where of old times they have been accustomed to be held, unless the King grants power to certain new places so to do. In these new fairs we say that the lords of the place where the fairs are held must not arrest any of the merchants who resort to them, demanding tribute for the things which they brought to the fair or otherwise, but those only which are conceded by the grant of the fair." (The words which follow refer to the enforcement of fair-debts).

Law 4. How merchants and their wares should be protected.

This law makes the lord of the place responsible for compensation in the absence of the successful prosecution of thieves. Laws 5, 6, and 7 refer to the dues to be paid, whereof the King was to have two parts and the town one;

(*g*) By the Roman law those who kept merchandise out of the market to enhance the price (*Dardanarii*) were prohibited from trading or were banished. (D. 47, 11, 6 pr.).

and of their farming-out. The brevity of this book must oblige the reader to draw his own conclusions as to the evils intended to be remedied by the foregoing laws.

The instructed reader will know of the existence of many local costums, or fueros—some confined to a particular municipality.

Interest in the Northern trade did not monopolise the attention of this enlightened monarch, Alfonso the Wise, under whose fostering care the more important Mediterranean trade greatly developed. Not only did the Spanish merchants attend the fairs of south and central France, but, owing especially to his being also Monarch of Sicily and Naples, the trade with Italy grew sufficiently to warrant the appointment of consuls at Pistoja in 1107, Messina in 1128, Sienna in 1145, and Pisa in 1161. The trading voyages of the Spaniards at this time extended to the more important cities of the Levant, and Alfonso made a commercial treaty with the Sultan of Egypt in 1189 (*h*).

It will be remembered that this Levant trade was of immemorial standing, varying only according to the nations which were for the time the jealous masters of the sea. The fall of the Saracen power left the trade free so far as it ever could be free in centuries when Arab, Barbary, and sometimes English, and other pirates had their living to make.

In the fourteenth century there were factories, auxiliary to Burgos, in Bordeaux, Rochelle, Nantes, Rouen, Dieppe, and several places in England, Scotland, Ireland, and Germany. Trade was also extensive in the Mediterranean, and even England and Germany were supplied from Spain with fine ships (*i*).

Numerous documents are shown by Mas Latrie in his "Traités de Paix entre les Chrétiens," etc (pp. 279, etc.),

(*h*) "Histoire du Commerce entre le Levant et l'Europe," G. B. Depping, 1830, Paris, vol. ii., p. 3, etc.

(*i*) "La Marina de Castilla," Fernández Duro, pp. 158-162.

which attest the considerable commerce between Aragon and the Mogreb from 1227 to 1512.

Now the great fairs of Bruges, held in January and May, were founded about 958 by Count Baudouin the Young (*k*), and they maintained their pre-eminence until about 1500.

The voyage from Spain to Flanders was accounted the most dangerous of all. Bruges in the fourteenth century was the great emporium for the trade of the North Sea, as the winter quarters of the Baltic fleet. Seventeen communities of foreigners were established in their mercantile houses. These were founded by the Germans in 1340, Biscayans in 1348, Nuremberg in 1361, Irish in 1383, Scotch in 1386, Portuguese in 1386, Catalans in 1389, English in 1390, Hansa in 1392, Venice in 1405, Calais in 1453 (*l*).

The remainder of this chapter is chiefly concerned with the evidences of the commercial activities of Spain with Flanders, as related by M. Jules Finot (*m*).

The origin of the trade between the two named countries is to be sought in the frequent pilgrimages of the twelfth century, made by the Flemings to the famous shrines of St. James of Compostela and Our Lady of Guadalupe. These pilgrims carried with them goods, chiefly of cloth, which they sold en route or at Compostela and so avoided carrying cash, while at the same time securing profit to themselves (p. 5). On the other hand they would take back with them goods of Spain, chiefly dried fruits and almonds and wines. It was usual (p. 12) to go by land and to return by sea from Oporto or Bilbao, when more bulky cargoes could be taken. Once in Spain, it was natural that

(*k*) "Relations entre Flamands et Portugais," by E. van den Bussche, "La Flandre," vol. iv., p. 45.

(*l*) Capmany, "Memorias Historicas, etc., de Barcelona," vol. i., p. 126.

(*m*) "Relations Commerciales et Maritimes entre la Flamande et l'Espagne au Moyen Age" (Annales du Comité Flamand de France).

travellers, who were as much traders as pilgrims, found it profitable to extend their journeys to other parts of the Peninsula.

By the latter half of the thirteenth century, it is clear (p. 18) that Spanish merchants frequented the Lille fairs with their wool and fruits, and it is probable that some were already settled in Bruges. It was due to the influence of Lübeck that foreign merchants, and among them the Spaniards, were welcomed at the new free fair of Ardenberg, in Zealand, in 1280, and at the fairs of Munster (pp. 20, 21). About the same time they join in a representation complaining of the unjust practices of the official weighmen at Bruges, and almost simultaneously letters of safe-conduct were granted by Edward I. to Spanish merchants coming to his kingdom (*n*).

Depping (*o*) shows that by the middle of the thirteenth century Spanish merchants frequented the fairs of France from the south, and probably those of Flanders, while other authors confirm the statement. Thus Capmany (*p*) relates that James I. of Aragon, in a letter of 1259, orders the leather merchants of Lerida, attending the fairs of Champagne, to elect a consul to co-operate with the consuls of the leather merchants of Cordova and Montpellier in the allotment of the places reserved to the Aragonese for selling their goods.

The wars between France and Flanders, which began at the end of the thirteenth century, gave Edward I. an opportunity, which he did not miss, of inviting the foreign merchants and artificers to live and trade in England (February, 1304); an attempt which was partly successful, though not to the extent of causing them to abandon the old markets of France and Flanders. The rupture between England and Flanders in 1333 was the occasion of

(*n*) Rymer's "Foedera."
(*o*) "Histoire du Commerce entre le Levant et l'Europe, p. 243.
(*p*) "Memorias Historicas, etc., de Barcelona," vol. iv., p. 5.

a fresh effort on the part of the former to foster weaving in the homeland and ruin the wool trade of the latter by stopping all export of wool to that country and prohibiting all importation of foreign cloth.

In 1348 Louis de Male granted a charter of privileges to the seamen and traders of Castilla, in confirmation of privileges already enjoyed, a charter more than once renewed (*q*).

It was the practice for the Spanish trading fleet to set sail early in March so as to arrive at the port of l'Ecluse in good time for the May fair at Bruges. About four months would be occupied in disposing of their wares at the fairs of Flanders and there buying principally cloth made locally and goods, such as furs, brought from the Baltic by the fleet which came thence as far as Bruges once a year. The naval battle of Winchelsea, fought by the English in 1350 against forty armed Spanish merchant ships sailing home from l'Ecluse, was followed by a commercial truce which was to last for twenty years with Castilla and Biscaya (*r*).

In the year 1486 thirty-three out of the seventy-five vessels which entered the port were Spanish and six Portuguese, their wool trade having been greatly favoured by the prohibition of the importation of English wool and cloth after the Treaty of Arras, and other evidence of Spanish commerce is shown by the considerable loans made by the merchants to the city of Bruges (*s*).

It may be mentioned that in 1414 the Convent of Minor Friars at Bruges granted to the merchants of Castilla the chapel of Sainte Croix, and that in 1452 letters patent were issued by Philippe le Bon, whereby, in consideration of the fact that the Bruges Fair was so near Easter that foreigners often found their wares detained on the way, arriving too late for the show-days, he decreed that freedom from toll

(*q*) Finot, p. 55.
(*r*) *Ib.*, p. 76.
(*s*) *Ib.*, p. 217.

should begin fifteen days after Easter, *i.e.*, "the Sunday on which the *Misericordia* was sung in the mother church, and should last for another fifteen days" (*t*). In 1415 he prescribed a fresh ordinance directing foreign merchants to reside in Bruges, except at the time of the privileged fairs, to abandon retail trade, etc. (*u*).

We do not know from Anderson's "Origins of Commerce" (*x*) to what country the ships next referred to were bound, but they were, perhaps, en route for Southampton. At any rate, the notice is some evidence that the Spanish trade through the Channel was considerable. Quoting Rymer (*y*), the author says:—

> "King Edward IV. acknowledges a debt of eleven thousand Spanish crowns to the merchants of Guipuscoa, in Spain, of the value of which sum certain English ships had robbed them on the seas: but as Edward, at this time more especially, could not well spare the paying of this sum in ready money, he promises to allow the same to the Guipuscoan merchants out of the customs hereafter to become due to him by them, on their importation and exportation of merchandize."

To show the extent of personal intercourse with Spain in the first half of the fifteenth century we may quote Anderson, who records that leave was given in 1429 and 1445 to 2,460 and 2,100 British pilgrims respectively to go to Santiago de Compostela, taking with them only enough money for their necessary expenses.

Portugal.

Those who desire fuller information about the trade of this country with Flanders should consult the article by M. Emile van den Bussche, "Relations entre Flamands et

(*t*) Finot, p. 192.
(*u*) *Ib.*, p. 235.
(*x*) Vol. i., 292.
(*y*) "Foedera," vol. xi., 841.

Portugais," " La Flandre," vol. iv., p. 32, in the course of which the author states that the first commercial relations of importance followed the marriage in 1184 of Matilda, daughter of King Alfonso, with Philippe of Alsace, Count of Flanders, when a large number of Portuguese established themselves at Bruges, which became the *entrepôt* for the merchandise of Spain and Portugal, the first exchange business being established there at the end of the twelfth century (*z*).

Many more Portuguese settled at Bruges in 1211 on the marriage of Fernando, son of Sancho I. of Portugal, with Countess Jeanne of Flanders (*a*).

Finot (*b*) mentions that, although previous to 1445 the Portuguese had considerable trade with Bruges, it was not until that date that they built their own hotel or consular house; on the other hand the Flemings had a charitable foundation at Lisbon, as they had also in several Spanish cities (*c*).

(*z*) See J. Desmedt, " Memoires," vol. ii., p. 59.
(*a*) Finot, pp. 42, 53.
(*b*) *Ib.* p. 285.
(*c*) *Ib.* p. 289.

CHAPTER VI.

England (*a*) and Scotland.

England.

It is probable that the Romans introduced fairs into England as into many other places, and particularly on the borderlands. Alfred directed that alien merchants should come only to the four fairs of London, York, Bristol (*b*), and Winchester, and remain no more than forty days. Ethelred II. proclaimed that ships of merchants or of enemies from the high seas, coming with goods into any port, should be at peace. Henry I. granted unto the citizens of London freedom from "lestage," a due for leave to sell at fairs, and from other tolls. Magna Carta granted that "all merchants shall have safety and security in coming into England and going out of England, and in staying and travelling through England, as well by land as by water, to buy and sell without any unjust exactions, according to ancient and right customs, excepting in time of war, and if they be of a country at war with us: and if such are found in our land at the beginning of a war, they shall be apprehended without injury to their bodies and goods until it be known to us, or to our Chief Justiciary, how merchants of our country are treated who are found in the country at war with us; if ours be in safety there, the others shall be in safety in our land." This was confirmed in 1216. In 1235 permission was given to the merchants of Köln to attend fairs in all parts of England; but then they were in favour, since they advanced money

(*a*) Many interesting poems relating to our foreign trade of the Later Middle Ages will be found in the "Libel of English Policy" (1436), issued as an argument for a strong English navy. It is printed in "Political Poems and Songs," vol. ii., ed. by Thomas Wright (1861).

(*b*) As to the right to this fair which became attached to the tenancy of a certain cell in the Church of St. James, and so the property of the Prior, see "The Little Red Book of Bristol," vol. i., pp. 108, 238.

to meet the needs of Edward I. and took a charge on the wool excise, must to the displeasure of loyal English.

The Statute of Merchants or Acton Burnel (1281 and 1283) provided summary execution when a debt had been acknowledged before the royal officers of the fairs at London, York, and Bristol; and by the statute of 1285 this provision was extended to other places and more numerous officers were appointed. For the acknowledgment of debt it was enacted that "a seal shall be provided that shall serve for fairs, and the same shall be sent unto every fair under the King's seal by a clerk sworn, or by the keeper of the fair, and the seal shall be opened before them, and the one piece shall be delivered unto the aforesaid merchants, and the other shall remain with the clerk; and before them, or one of the merchants, if both cannot attend, the recognisances shall be taken as before is said."

It was not to be supposed that the remunerative privilege of holding fairs would pass unchallenged by needy monarchs, and so we find the origins of fairs and other franchises were from to time to time in the Middle Ages made the subject of inquiry, and these inquisitions would be followed by fresh grants or confirmations on certain payments being made.

The statute 2 Edward III., chapter 15, was directed to prevent fairs being held for a longer time than was lawful. It is otherwise interesting as recognising the twofold origin of fairs—either by royal grant or prescription: "All the lords which have fairs, be it for yielding certain ferm for the same to the King, or otherwise, shall hold the same for the time that they ought to hold it, and no longer, that is to say, such as have them by the King's charter granted them, for the time limited by the said charter; and also they that have them without charter, for the time they ought to hold them of right." The statute then directed the duration of the fair to be cried at its commencement, and prescribed penalties both on lords and merchants who

might exceed. The Act of 5 Edward III., Chapter 5, prohibited sales by merchants after the fair was closed.

In 1335 a statute was passed giving complete freedom and protection to merchant strangers to buy and sell within the realm, save only trading with enemies and the export of wine, other later statutes modifying the restrictions on this trade.

In 1486 an Act was passed (c. 9) enabling freemen of London to carry their wares to any fairs or markets, notwithstanding any city ordinance forbidding this; chapter 6 of 1496 made illegal the attempted monopoly of the Company of Merchant Adventurers to trade in the markets of Flanders, Holland, Zealand, and Brabant. In 1552, by chapter 9, the benefit of clergy was taken away from robbers at fairs and markets. In 1554 country manufacturers and merchants were forbidden to sell by retail in cities or towns corporate except at the fairs, since they were said to impoverish the town dwellers by competition. There was other and later legislation, but of no great importance and of little historic interest.

In the proclamations to suspend fairs in the times of the plagues of 1625 and 1630 are mentioned the two great fairs of Stourbridge, near Cambridge, and St. Bartholomew, Smithfield. The origin of the former is lost in antiquity, but the first charter was granted in 1211 by King John to the Lepers' Hospital of St. Mary Magdalen, the fair to be held in the close on the Vigil and Feast of the Holy Cross. This fair exists still, and is fully described by Cornelius Walford in his book on fairs. The right of holding the St. Bartholomew fair was granted in 1133 to the prior of the monastery, founded in 1102. It came to an end in 1839 through the refusal of the Corporation to let sites for the booths, the fair having degenerated into an occasion of mere vulgar and rowdy amusement (*c*).

An interesting summary of the growth of the English fairs is given in the Encyclopaedia Britannica, which says:

(*c*) See "Memoir of Bartholomew Fair," by Morley, 1859.

"In England it was only after the Norman Conquest that fairs became of capital importance. Records exist of 2,800 grants of franchise markets and fairs between the years 1199 and 1483. More than half of these were made during the reigns of John and Henry III., when the power of the Church was in ascendency. The first recorded grant, however, appears to be that of William the Conqueror to the Bishop of Winchester for leave to hold an annual free fair at St. Giles' Hill. The monk, who had been the king's jester, received his charter of Bartholomew fair, Smithfield, in the year 1133. In 1248 Henry III. granted a like privilege to the Abbot of Westminster in honour of the 'translation' of Edward the Confessor. Sometimes fairs were granted to towns as a means of enabling them to recover from the effects of war and other disasters. Thus, Edward III. granted a free fair to the town of Burnley, in Rutland, just as in subsequent times Charles VII. favoured Bordeaux after the English wars, and Louis XIV. gave fair charters to the towns of Dieppe and Toulon."

The book of Cornelius Walford is probably the most authoritative on English fairs.

Scotland.

It is interesting to note that at the time when the Council of the Duke of Burgundy approved the project of an expedition against the Turks in 1457, there were in the port of l'Ecluse "one barge of Scotland belonging to the Bishop of St. Andrews, a very fine vessel of 500 tons; another of 350 tons, a carvel of 140 tons belonging to the Bishop of Aberdeen, a barge of Scotland of 150 tons, a small carvel of Scotland of 28 tons, and a small whale ship of Scotland of 20 tons" (*d*).

Pegolotti, travelling about 1325, gives a curious list of religious houses in England and Scotland which traded to Pera in wool (*e*).

(*d*) Finot, p. 203.

(*e*) "Cathay and the Way Thither," by Sir H. Yule, vol. ii., p. 307.

Chapter LXIII. gives a list of the "Houses (Religious) in Scotland, in England, that have wool":—

Niobottoli (Newbattle), Mirososso (Melrose, or perhaps "Mary's House"), Barmunacche (Balmerynac or Balmannac, is the old name of the Abbey of Balmerino in Fifeshire), Chupero (Cupar), Chilosola (Killoss or Kinloss in Moray), Donfermellino (Dunfermline), Dondarnane (Dundrennan), Grenelusso (Glenluce), Balledirucco (?), Guldingamo (Coldingham), Ghelzo (Kelso), Norbonucche (North Berwick ?), Sansasano (?), Grideghorda. Then follow the houses of the Cistercian Order in England: Olcholtam (Holm Cultram), Nieomostriere in Orto Bellanda (Newminster in Northumberland), Fornace in Orto Bellanda (Furness in Northumberland), Calderea in Coppolanda (Calder Abbey in Cumberland), Salleo in Cravenna (Sawley in Craven), Giervalese (Jervaulx), Fontana (Fountains), Biolanda (Byland), Bivalse (? Rivalse, Rievaulx), Miesa in Oldaraese (Meaux in Holderness), Chirchestallo (Kirkstall), Laraccia (Roche), Il Parco di Livia (? Louth Park, called "de Parco lude"), Chiricistede (Kirkstead), Revesbi (Revesby), Svinsivede (Swineshead), Lavaldeo (Vaudly or "de valle Dei," Lincs), Rufforte in Estierenda (Rufford or Rumford, Notts), Gierondona (Gerondon or Geraldon, Lincs).

In "Mediaeval Scotland," by R. W. Cochran-Patrick, mention is made (p. 111) of extensive trading privileges granted to religious houses, special mention being made of Vauday (Vallis Dei), Dundrennan, Melrose, Cupar, Berwick, Holmcultram, Glenluce, Kilwinning, in the early part of the thirteenth century. Agreements are also cited of the years 1347 and 1541 with the burgesses of Middelburg for the establishment there of a staple under the mayor of the merchants of Scotland, and of a similar contract in 1540 with Antwerp where a "fair and pleasant house" was to be opened under their "conservator."

CHAPTER VII.

Conclusions.

To sum up the effect of the substance of this part of the book we cannot do better than reproduce the concluding words of M. Huvelin:—

"The influence of the fairs on our public law, on the movement of municipal emancipation and on the enfranchisement of the commons is undeniable. More striking still is their influence on the relations of international law; the term 'fair' is the equivalent of the term 'peace.' The reaction against the principles of primitive hostility is working under the influence of commercial needs. If, perhaps, it is incorrect to say that the relations of hospitality, containing in germ the most characteristic institutions of international law, are only borne of the necessities of trade, it must still be recognised that they have powerfully contributed to second in this matter the affinities of religions and races. Thanks to the progress of the peace of the fairs and their safe-conducts, the communications of foreigner with foreigner become more certain; international relations multiply; transactions are surrounded by guaranties; and the ideas of good faith and of the loyalty which should preside over commerce are more and more developed. At the same time the means of transport are being perfected. Men, hitherto thrown back upon themselves in the bosom of a family group, assume contact with each other; original mistrust is weakening; and already there appear tendencies to sociability which hitherto nothing had revealed. Little by little the last vestiges of primitive

hostility disappear. Reprisals and the *droit d'aubaine* cease. Privileges which had for long made fairs and markets asylums withdrawn from the common law, gain more and more ground. The peace of commerce conquers the world, and fairs only disappear after accomplishing their work.

"Their rôle is not less remarkable in economic matters. They are the first places where the notions of value are able to develop; the law of supply and demand, the law of the balance of trade find there their first application. It is at the fairs that merchandise and money cease to be mere objects of consumption, and become capital. Thanks to the fairs, traffic is regularised and submitted to the great law of competition.

"At the same time the law of the fairs, born of the peace of commerce, is acting strongly on institutions under the ordinary law still embued with its ancient rigours. . . . The tendency to uniformity is strengthened. In the midst of the diversity of local law, the law of the great fairs everywhere remains the same in its essential features. This law is universal almost by the same right as the Canon law. The jurisdictions of the fairs command obedience in all parts. And thus emerges the conception of the law merchant, outside and above civil statutes and local commercial usages. . . . The modern world has preserved visible traces of this influence. In the words of Goldschmidt, it carries a mercantile signature. Everything shows it—both things and words: objects without defects are called merchantable goods, current money is termed 'money of the merchants,' movable fortune is often called 'fortune of the merchants.'

"Thus the fairs, this original form of terrestrial commerce, have been in the history of civilisation, incomparable instruments of reconciliation, of unification and of peace."

APPENDIX.

Procuration dated 4 May, 1472, at Famagusta, by James Prince of Lusignan

In nomine domini, amen. Per hoc presens publicum instrumentum cunctis pateat evidenter et sit notum, quod anno a Nativitate Domini millesimo quadringentesimo septuagesimo secondo, indictione quarta, die vero quarta mensis Maii, pontificatus sanctissimi in Christo patris et domini nostri Sixti, divina providentia pape quarti, anno primo, in mei notarii publici testiumque infrascriptorum, ad hec specialiter vocatorum, habitorum et rogatorum presentia, personaliter constitutus serenissimus et illustrissimus princeps et dominus dominus Jacobus de Lusignano, Dei gratia, Hierusalem, Cypri et Armenie rex, confidens de spectabilitate, etc., spectabilis et magnifici viri domini Johannis Petri Fabregues, comitis Jappensis et Carpassii, ac classis ejusdem serenissimi domini regis capitanei generalis et oratoris, etc., fecit constituit, creavit, etc., suum verum, etc., procuratorem specialem et generalem, etc., ad se presentandum et comparendum coram quibuscomque serenissimis et illustribus principibus et dominis dominis regibus, ducibus, comitibus, etc., gentium armorum capitaneis, conducteriis, etc., el specialiter coram illustrii domino duce Venetiarum, etc., ad agendum, concordandum, etc., ligas, pacta, conventiones, etc., et recipiendum et exigendum quascumque pecuniarum summas, etc., a quibuscumque mercatoribus et banqueriis, etc.

Acta fuerunt hec in insula Cypri, in civitate Famaguste, in palacio regali, sub anno, die, mense, indictione, et pontificatu quibus supra, presentibus spectabilibus et magnificis

militibus dominis, etc. [names] testibus ad prefata vocatis, habitis et rogatis.

Et ego Simon Baradellus de Padua, publicus imperiali auctoritate notarius, premissis omnibus dum sic agerentur interfui, una cum prenominatis testibus et, aliis negotiis impeditus, per alium scribi feci et in fidem roboravi, per testimonium mei propria manu subscripsi, signumque meum infrascriptum apposui consuetum, de mandato prefati serennissimi regis, tamquam ejus cancellarius, impressione regalis sigilli roboravi.

From "Documents Nouveaux etc. (Cyprus)," by Max Latrie.

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